PUBLIC TRUSTEESHIP AND WATER MANAGEMENT:

Developing the South African concept of public trusteeship to improve management of water resources in the context of South African water law

by

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Abstract

South Africa is faced with extraordinary challenges when it comes to managing its water resources. To redress the results of discrimination caused by Apartheid and its political antecedents, the modern constitutional state sought to address the issues of access to water resources and sanitation services by introducing section 24 of the Constitution, which provides for the right to an environment that is not harmful to one's health or well-being. In addition, section 27 seeks to entrench the right of access to sufficient water. Consequently, the National Water Act 36 of 1998 was introduced, which caters for the administration of water resources. The Water Services Act 108 of 1997, which seeks to ensure the provision of water and sanitation services completes the statutory framework.

This framework provides for the state to be either the trustee or the custodian of our water resources. However, the terms 'trustee' and 'custodian' are not defined by either statutes. The legal framework nevertheless sets the parameters for state trusteeship and/or custodianship. This may be gleaned from the constitutional provisions, the National Water Act and the Water Services Act, as well as their accompanying regulations and policies. Despite oversights and inconsistencies, it is argued, the legislative framework very clearly provides the statutory content of trusteeship and custodianship. The state is expected to *manage* water in accordance with the prescribed constitutional mandate.

The nature of the terminology used in the legislation has prompted a comparison by academic authors of modern trusteeship with the Roman and Roman-Dutch law classifications of *res publicae.* Alternatively, the public trust doctrine has been used as a comparator for evaluating the functioning of trusteeship. However, there are numerous problems with both of these comparisons. Neither facilitates a clear, meaningful understanding of trusteeship or custodianship.

The thesis set out here is that, as trusteeship and custodianship are both statutory creatures, the nature of their content must be sought in the legal framework itself. In particular, the National Water Resource Strategy provides insight into the

duties of the state. The Strategy aims to give effect to this legal framework, and provides that there are three values that water management aims to achieve: sustainability, equity and efficiency.

In an attempt to ensure compliance with these values, Integrated Water Resource Management and Adaptive Management have been implemented. These are methods of water management which incorporate a systems-approach to water resources. They take an holistic approach to water resources within a catchment management area. In addition, decision-making is flexible, with an emphasis on facilitating a learning process, in order to actively manage the resource as new information becomes available.

The thesis demonstrates that, despite the detailed nature of the legal framework, the state is still failing to administer water in a manner that prevents the deterioration of the resource or that provides adequate water resources to promote the values of dignity and equality. A number of remedies exist in respect of which the state can be held accountable. What is apparent, however, is that the high costs of litigation, as well as the time required for a litigious matter to unfold, make these remedies entirely inaccessible to the most vulnerable in society.

What is needed in the context of the management of water is a synergy between the relatively sound theoretical framework and its practical implementation. The sad reality in South Africa is that the state is aware of the challenges it faces, chief amongst which is inefficiency caused by incompetence, a lack of skill and inadequate financing. While long-term plans have been proposed to attend to the shortcomings of the current system, a more drastic approach is required. The state is currently not able to meet the duties of trusteeship, as envisaged by the legislative framework, and it is the most vulnerable in our society who pay the price for this failure.

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List of Abbreviations

AG	Auditor-General
CMA	Catchment Management Agency
CMF	Catchment Management Forum
CMS	Catchment Management Strategy
CSR	Corporate Social Responsibility
DWA	Department of Water Affairs
DWAF	Department of Water Affairs and Forestry
IWRM	Integrated Water Resource Management
MEC	Member of the Executive Council
NEMA	National Environmental Management Act
NGO	Non-Governmental Organisation
NWA	National Water Act
NWRS	National Water Resource Strategy
OECD	Organisation for Economic Cooperation and Development
PAIA	Promotion of Access to Information Act
PAJA	Promotion of Administration of Justice Act
RWU	Regional Water Utilities

SAHRC	South African Human Rights Commission
UNEP	United Nations Environment Programme
WAR	Water Allocation Reform Programme
WCWDM	Water Conservation and Water Demand Management
WMA	Water Management Area
WPI	Water Poverty Index
WAMS	Water Flow Monitoring System
WRC	Water Research Commission
WSA	Water Service Authorities
WSP	Water Service Providers
WUA	Water User Association
WWF	World Wide Fund for Nature

List of Latin Terms and Phrases

flumen publicum	public river
flumen	river
hydrophylacas	water custodians entrusted with the management of city water
jus privatum	private law
jus publicum	public law
jus sacrum	sacred law
princeps	authority
regalia	sovereignty
res divini iuris	things concerning the gods
res extra commercio	things that fall outside commerce that cannot be privately owned
res extra nostrum patrimonium	things that fall outside commerce that cannot be privately owned
res humani iuris	broad category of public things
res in commercium	things that can be privately owned and be part of commerce
res nostro patromonio	things that can be privately owned and be part of commerce

res omnium communes	things common to all men
res publicae	things deemed to be public property
res universitatis	things belonging to a corporate body
res	thing
rivus	smaller stream or rivulet

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Chapter One:

INTRODUCTION

1. Introduction

Water is an essential but limited commodity which is increasingly in demand, as the world's population and industry grows. It therefore requires regulation and protection by the State.[1] As quality of life and the pace of development around the world increase, so too does the demand for water.[2] It has been said that the 'ability of nations and societies to develop and prosper is linked directly to their ability to develop, utilise, and protect their water resources'.[3] As a result, the combination of a degradation of the quality of water and a decrease in the quantity of water available per capita 'represents the most serious and tangible single threat to the flows of various goods and services required by society'.[4] This threat holds true in South Africa. The degradation and decrease of water quality and quantity respectively occurs amidst rapid demographic and economic shifts, adding to the complexity of water management in our country.[5]

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[1] P Lawn *Sustainable Development in Ecological Economics* (2006) 191; H Thompson *Water Law: A Practical Approach to Resource Management and the Provision of Services* (2006) 7; P Ashton, D Love, H Mahachi et al *An Overview of the Impact of Mining and Mineral Processing Operations on Water Resources and Water Quality in the Zambezi, Limpopo and Olifants Catchments in Southern Africa* (2001) xxvii - xxviii.

[2] P Ashton, D Love, H Mahachi (note 1 above) xxvii; B Schreiner, G Pegram and C von der Heyden 'Reality check on water resources management: Are we doing the right things in the best possible way?' (2009) 11 *Development Planning Division (Working Paper Series)* 6; M Falkenmark 'Water scarcity – challenges for the future' in E H P Brans et al (eds) *The Scarcity of Water* (1997) 21.

[3] R D Walmsley, J J Walmsley and C Walmsley 'Testing and development of catchment sustainability indicators' (2004) *Report to the Water Research Commission* 1; J J Walmsley 'Framework for measuring sustainable development in catchment systems' (2002) 29 *Environmental Management* 198; G Jewitt 'Can Integrated Water Resources Management sustain the provision of ecosystem goods and services?' (2002) 27 *Physics and Chemistry of the Earth* 887; D Reed and M de Wit (eds) *Towards a Just South Africa: The Political Economy of Natural Resource Wealth* (2003) 13.

[4] P Ashton, D Love, H Mahachi et al (note 1 above) xxx.

[5] B Schreiner, G Pegram and C von der Heyden (note 2 above) 7.

The certainty of South Africa's water supply is in a compromised state, not only in relation to the scarcity of water,[6] but also its quality. It is estimated that South Africa will 'reach the limits of its economically useable land-based fresh water resources' in the next 40 years, which demonstrates the urgent need for the implementation of effective strategies.[7]

The pace at which solutions for water crises can be properly implemented, however, is often very slow.[8] This is exacerbated by the fact that water management is a highly complex, multi-faceted process involving multiple role players and considerations. A water crisis 'is much slower in developing, like a motor accident viewed in slow motion, or a large ship bearing down on an iceberg, with lots of time to contemplate the approaching collision'.[9] It is thus imperative that government reacts appropriately, sufficiently and timeously, to steer clear of these metaphorical icebergs.

Against the backdrop of the importance of water to society, this thesis aims to evaluate the legislative requirements of water management and governance in South Africa. The contemporary legislative regime regulating water provides that the state is the trustee of this resource.[10] Particularly, therefore, this thesis seeks to ascertain and assess the parameters and content of trusteeship in the context of water management.

[6] A Allan 'A comparison between the water law reforms in South Africa and Scotland: Can a generic national water law model be developed from these examples' (2003) 43 *Natural Resources Journal* 426; UNEP *Vital Water Graphics: An Overview of the State of the World's Fresh and Marine Waters* 2ed (2008); P Ashton, D Love, H Mahachi et al (note 1 above) xxix. *Mazibuko and others v City of Johannesburg and others* 2010 (4) SA 1 (CC) [hereafter '*Mazibuko (CC)'*] para 3.

[7] H Thompson (note 1 above) 13; P Ashton, D Love, H Mahachi et al (note 1 above) xxviii; See also C Sullivan 'Calculating a water poverty index' (2002) *World Development* 1195; SAPA 'Water shortage in SA possible – Molewa' *News24* 20 May 2013.

[8] For example, the Director-General of Water Affairs released a statement that there was likely to be a water supply shortage in the Gauteng area by 2013. However, even though this crisis was foreseen in 2009, the earliest a remedy can be implemented by is 2019. C E Herold 'Des Midgley memorial lecture: The water crisis in South Africa' (14th Sanciahs Symposium, 21-23 September 2009) 3.

[9] C E Herold (note 8 above) 3.

[10] S 3 of the National Water Act 36 of 1998.

2. Trusteeship of Water: Background

From the outset trusteeship can be defined broadly, in terms of the Constitution, or more narrowly, in terms of the statutory framework. Trusteeship, in its broadest sense applies not only to the duties incumbent on the state, but also those of the courts and society more generally.[11] At this point in the development of a South African law on state trusteeship of natural resources, it would be overambitious to attempt to give more specific content to such a broad, vague notion of the core concept. Instead, the focus here is on developing the content of state trusteeship in its narrower sense, as espoused by section 3 of the National Water Act 36 of 1998 (the 'Water Act'). This provision does not expressly define the concept of state trusteeship, but provides that the duties of the government as trustee are to protect, use, develop, conserve, manage and control water.[12] It further provides that these duties are to be undertaken so that sustainability and equity are furthered, that constitutional obligations are satisfied, and decisions are taken in the public interest.[13] However, these concepts are broad and are not defined by the Act.[14]

The Water Services Act 108 of 1997 (the 'Services Act'), on the other hand, describes the role of the state as the custodian of water resources, but also fails to define what this entails. The duties of Water Services Authorities in terms of the provision of access to water are to 'progressively ensure efficient, affordable, economical and sustainable access to water services'.[15] This thesis will evaluate these concepts together, and they will be referred to generally as trusteeship.[16]

[11] See below at Chap 3 (note 62).

[12] S 3 of the National Water Act.

[13] S 3 of the National Water Act.

[14] L Ferris 'The public trust doctrine and liability for historic water pollution in South Africa' (2012) 8/1 *Law, Environment and Development Journal* 3.

[15] Preamble read together with s 11(1) of the Water Services Act 108 of 1997.

[16] E van der Schyff notes that these terms have been used interchangeably throughout the various legislative enactments that utilise the concept of trusteeship. She, however, argues that trusteeship and custodianship both fall within the larger terminology of 'stewardship'. See E van der Schyff 'Stewardship doctrines of public trust: Has the eagle of public trust landed on South African soil? (2013) 130 *South African Law Journal* 388.

The motivation for this research question is therefore to discuss the aspects of trusteeship in the context of water law, both from a wide and narrow perspective, in order to determine how this notion is to operate in practice. This is necessary particularly in light of the plethora of governance issues that permeate water management.

The majority of South Africans currently enjoy access to clean, safe water for consumption and sanitation and this access is a fundamental right entrenched in our Constitution.[17] Prior to 1994, this most basic right was not afforded to everyone, and for many people the procurement of water, simply for drinking purposes, presented a daily struggle.[18] Between 12 and 14 million people - approximately 43% of South Africa's black population - did not have access to safe drinking water in 1994.[19] In addition to this, over 20 million people did not have any form of infrastructure in place for sanitation.[20] As part of the government's commitment to overhauling the approach to socio-economic rights that prevailed in South Africa at the termination of Apartheid, a new system of water rights was implemented and the government was made 'trustee' of this resource.[21]

However, the fact that access to water is now protected as a right in the Constitution does not necessarily mean that the reliable provision of sufficient and

[17] S 27(1)(b) of the Constitution of South Africa, 1996. *Mazibuko (CC)* para 2; H Thompson (note 1 above) 1; B Van Koppen, N Jha and D J Merrey 'Redressing racial inequities through water law in South Africa: Revisiting old contradictions?' (2002) *Comprehensive Assessment Reseach Paper* 9. G Morrison, OS Fatoki, E Zinn et al 'Sustainable development indicators for urban water systems: A case study evaluation of King William's Town, South Africa, and the applied indicators' (2001) 27 *Water SA* 228.

[18] *Mazibuko (CC)* para 2; C de Coning 'Overview of the water policy process in South Africa' (2006) 8 *Water Policy* 510 discusses how this came to be at the top of the agenda in the National Water Policy. See also A Kok and M Langford et al 'Water' in S Woolman, T Roux et al (eds) *Constitutional Law of South Africa* 2ed (revised 2012) 56B-22.

[19] *Mazibuko (CC)* para 2; H Thompson (note 1 above) 9; B Van Koppen, N Jha and D J Merrey (note 17 above) 3 Another statistic which is at odds with this one is that in 1996 there were 16 million people without drinking water and 21 million without access to sanitation – see in this regard G J Pienaar and E van der Schyff 'The reform of water rights in South Africa' (2007) 3/2 *Law, Environment and Development Journal* 1; M Muller 'Free basic water – a sustainable instrument for a sustainable future in South Africa' (2008) 20 *Environment and Urbanization* 69.

[20] H Thompson (note 1 above) 9; B Van Koppen, N Jha and D J Merrey (note 17 above) 3.

[21] S 3 of the National Water Act.

safe water to all households is a certainty. Nor does it mean that the quality and protection of water is practically guaranteed. The inability to access water is still one of the largest components associated with poverty, and the fight against poverty entails redressing this issue.[22] Furthermore, food security, poverty and access to water are closely related.[23] To this end, the government seeks not only to ensure access to water for domestic use, but also for commercial use.[24] In terms of the Free Basic Water Policy, the state has committed itself to ensuring that every household is provided with 6000 litres of water per month, and that this water supply should be available within 200 metres of each person's home.[25] However, the provision of water to the remainder of the population who still do not have access thereto presents great infrastructural, administrative and financial difficulties, given the fact that those still without water typically live in remote, rural areas.[26] Consequently, there are still approximately 5 million people, mostly in rural areas, who do not have a clean and reliable source of water for either personal or commercial purposes.[27]

Reliable access to drinking water is not the only issue facing those seeking to ensure the efficient management of water. Globally, the quality and quantity of water is constantly under threat and the urgency for its proper management is amplified by the fact that water is essential not only for personal use, but also the

[22] *Mazibuko(CC)* para 2. C Sullivan (note 7 above) 1195; B Van Koppen, N Jha and D J Merrey (note 17 above) 1-2; P Ashton, D Love, H Mahachi et al (note 1 above) xxvii. See also A Kok and M Langford et al (note 18 above) 56B-22. For a discussion on the relationship between poverty and development in the context of water, see T O Randhir and A G Hawes 'Ecology and poverty in watershed management' in J C Ingram, F De Clerck and C R del Rio (eds) *Integrating Ecology and Poverty Reduction* (2012) 113 – 126. See also F R Rijsberman 'Water scarcity: Fact or fiction?' (2006) 80 *Agricultural Water Management* 6. B Schreiner, G Pegram and C von der Heyden (note 2 above) 5.

[23] B Van Koppen, N Jha and D J Merrey (note 17 above) 8 – 9.

[24] B Van Koppen, N Jha and D J Merrey (note 17 above) 2.

[25] S 9 of the Water Services Act read with reg 3(b) of GNR 509 of 8 June 2001: Regulations relating to compulsory national standards and measures to conserve water. *Mazibuko (CC)* para 6; B Van Koppen, N Jha and D J Merrey (note 17 above) 10.

[26] H Thompson (note 1 above) 9.

[27] Water Research Commission 'Water and society: Upscaling community-based partnerships in South Africa' (2014) *Technical Brief* 1; S King 'Academics look for solutions to provide clean drinking water' *Mail and Guardian* 3 October 2012.

functioning of the economy.[28] Water is critical to industrial processes, as well as agricultural and mining activities.[29] In South Africa, the latter activities constitute the biggest portion of the economy.[30] While agricultural activities only constitute a small portion of the Gross Domestic Product ('GDP') per annum, if one factors in the secondary economic benefits (such as processing and marketing) the contribution rises to just under a third of the GDP.[31] It also accounts for approximately 60% of the water used in the country.[32]

Despite the necessity of agricultural and mining activities to the country's economy,[33] these sectors also cause many of the stresses on our water supply,[34] which presents something of a conundrum: On the one hand, agriculture is essential for the survival and prosperity of our nation, but on the other, it is draining our water supplies, whilst polluting water resources with fertilisers and other poisonous chemicals that find their way into streams and underground water through run-off.[35] Agricultural water use presents the highest proportion of water use globally.[36] There is also a direct correlation between the demand for water and the standard of living.[37] The increase of the world's population, coupled with the

[28] C E Herold (note 8 above) 2.

[29] H Thompson (note 1 above) 9. Irrigation accounts for approximately 60% of our water use, while 8% is required for mining and other large industrial uses.

[30] G R Backeberg 'Water institutional reforms in South Africa' (2005) 7 *Water Policy* 108.

[31] G R Backeberg (note 30 above) 109.

[32] Department of Water Affairs *National Water Resource Strategy* 2ed (2013) [hereinafter 'Strategy (2013)'] 55; P Mukheibir and D Sparks 'Water resource management and climate change in South Africa: Visions, driving factors and sustainable development indicators' (2003) *Report for Phase I of the Sustainable Development and Climate Change Project* 2**;** Editorial 'New water law won't help much' *Business Day Live* 5 September 2013.

[33] C Sullivan (note 7 above) 1195.

[34] W du Plessis and A A du Plessis 'Striking the sustainability balance in South Africa' in M Faure and W du Plessis (eds) *The Balancing of Interests in Environmental Law in Africa* (2011) 417.

[35] Department of Water Affairs *National Water Resource Strategy* 2ed (2013) [hereinafter 'Strategy (2013)'] 24; H Thompson (note 1 above) 6 - 7; M Hill *Understanding Environmental Pollution* 3ed (2010) 268; D Biello 'Fertilizer runoff overwhelms streams and rivers' (2008) *Scientific American*. See also C Sullivan (note 7 above) 1197, where she discusses the impacts of agricultural water use in Jordan, particularly how the groundwater is becoming heavily polluted by nitrates as a result of this process. M Kidd *Environmental Law* 2ed (2011) 92. Strategy (2013) 38.

[36] C Sullivan (note 7 above) 1196.

[37] C Sullivan (note 7 above) 1196.

ever-improving quality of life, results in an increased demand for food and consequently the demand for water.[38] Sullivan argues that there is a need for water to be more carefully managed,[39] by, for example, introducing technologies that use water more efficiently.

A similar problem presents itself when one considers the impact that mining and other forms of pollution have on our water supply.[40] For example, it is estimated that the combination of mining waste and human effluent is polluting the Olifants River catchment at a cost of R700 million per year. This cost, however, is not spent on cleaning up this water source, but rather treating consequential medical diseases, such as cholera and diarrhea, that are caused by this polluted water.[41] As a result, the state is left chasing its tail, as the current approach is to treat the symptoms, rather than the cause.

The state is not the only party involved in the management of water resources. Industries involved in the mining of natural resources, for example, are legally obliged to ensure that they do so sustainably;[42] but, they often fail to meet these obligations, and as a result, the pressure of Corporate Social Responsibility (CSR) on businesses is mounting.[43] It is imperative for these role players to become socially and environmentally more responsible; and it is the State that should enable such a development. It should take the rights and duties of communities affected, as well as key business entities involved, into account in developing a

[38] C Sullivan (note 7 above) 1196.

[39] C Sullivan (note 7 above) 1197. See also Ch 5 fn 275 below.

[40] See generally E A Ripley, R E Redman, and A A Crowder *Environmental Effects of Mining* (1996)*;* M Sengupta *Environmental Impacts of Mining: Monitoring, Restoration, and Control* (1993) 17 - 18; S King (note 27 above); H Thompson (note 1 above) 6 – 7; T Madihlaba in 'The fox in the henhouse' in D A McDonald (ed) *Environmental Justice in South Africa* (2002) 159.

[41] S King (note 27 above). This situation is not unique to this area, and many township areas are afflicted with disease caused by poor sanitation and waste removal facilities. See D Hallowes and M Butler 'Power, poverty and marginalized environments' in D A McDonald (ed) *Environmental Justice in South Africa* (2002) 69.

[42] Mineral and Petroleum Resources Development Act 28 of 2002, s 2, 3, 4, 51.

[43] P Bansal and R Roth 'Why companies go green: A model of ecological responsiveness' (2000) 43 *The Academy of Management Journal*; H Bulkeley 'Governing climate change: The politics and risk society' (2001) 4 *Transactions of the Institute of British Geographers* 440; Z Rionda 'What is corporate social responsibility?'(2002) *Catalyst Consortium* 1.

holistic approach to the management of resources. The question is whether this is provided for by the legislation pertaining to water, and further, whether this legislation is properly implemented.[44]

The issues facing the supply of clean and reliable water are not limited to economic factors.[45] Global warming and climate change threaten the quantity of water available for human consumption in various parts of the world.[46] In addition, over-population, high rates of evaporation as well as alien-invasive species that increase evapotranspiration rates are contributory factors that compromise water security.[47] Human interference also causes additional stress in the form of pollution, waste and abstraction of water, thereby reducing available resources. There are, in addition, the added complications in the South African context, in that access to water resources is inherently unequal.[48] All of the potential solutions to these issues are further impacted by physical, spatial and economic limitations, increasing the complexity of the management of water.[49]

Other difficulties that are encountered in terms of water include the discrepancy between supply and demand; the theft of water; and the deterioration of water infrastructure (which is further exacerbated by poor management strategies).[50] The challenges of South Africa's water supply, both in terms of quantity and quality, translate into management difficulties at an administrative level. These problems often result in a catch-22 situation for management institutions, where addressing one concern may exacerbate the extent or severity of other problems.[51]

[44] See Ch 5 (note 328 below).

[45] Strategy (2013) 37.

[46] Strategy (2013) 75; H Thompson (note 1 above) 5; Strategy (2013) 38; N L Engle, O R Johns, M Lemos and D R Nelson 'Integrated and adaptive management of water resources: tensions, legacies, and the next best thing' (2011) 16 *Ecology and Society* 1.

[47] A Allan (note 6 above) 426; H Thompson (note 1 above) 6 - 8.

[48] Department of Water Affairs 'Executive statement' in *Draft National Water Resource Strategy 2* (2012) 1.

[49] Department of Water Affairs (note 48 above) 2.

[50] C E Herold (note 8 above) 2.

[51] D D Tewari 'A detailed analysis of evolution of water rights in South Africa' (2005) *Water World IWHA* 694.

This is made worse by the fact that there are insufficient technical and management skills in the industry.[52] For example, the municipal sector has lost approximately 85% of its engineers over the last 15 years.[53] The management of water is a difficult scientific issue that requires the collection, analysis and monitoring of data.[54] This loss of human capital in this industry presents a massive hurdle for the state to overcome, as these skills cannot be easily replaced.

Of the available water in the world, only 0.007% percent – approximately 90 000 km^3 – can be used for human purposes.[55] In South Africa, percentages are even lower, due to the fact that it is a semi-arid country with a relatively low annual rainfall and a high evaporation rate.[56] The country also experiences severe weather patterns, in the form of intense and prolonged droughts, extreme floods,[57] as well as variable climates.[58] The functioning and well-being of an ecosystem is heavily dependent on sufficient water supply.[59] In turn, if an ecosystem does not have sufficient water to sustain its needs, it is likely that this will have a direct impact on available water. As a result, decision-makers must be mindful of the quantity of water required to sustain an ecosystem.[60]

Water is divided up into different categories, depending on its capacity for human consumption, as defined by the National Water Resource Strategy.[61] Blue water is available for general usage and found in rivers, dams and groundwater. Not all

[52] Department of Water Affairs (note 48 above) xii.

[53] C E Herold (note 8 above) 1.

[54] For example, GNR 3208 of 29 August 1969: Regional standards for industrial effluent, prescribes the scientific methods for the analysis of compliance with industrial effluent standards.

[55] Department of Water Affairs (note 48 above) 6; G Jewitt (note 3 above) 890.

[56] H Thompson (note 1 above) 4; *Mazibuko (CC)* para 3; G Jewitt (note 3 above) 887. See F R Rijsberman (note 22 above) 5 for a discussion on water scarcity indicators and how regions are defined as water stressed.

[57] H Thompson (note 1 above) 5.

[58] M Muller (note 19 above) 67; M I Msibi and P Z Dlamini 'Water allocation reform in South Africa: History, processes and prospects for future implementation' (2011) *Report to the Water Research Commission* 7; P Mukheibir and D Sparks (note 32 above) 1.

[59] P Mukheibir and D Sparks (note 32 above) 1.

[60] C Sullivan (note 7 above) 1198 – 1199.

[61] Strategy (2013) Annexure 'B' 2.

blue water is immediately available for consumption, as it may be polluted or alternatively, inaccessible.[62] Green water consists of water vapour, and includes the moisture found in the soil which is important for agricultural purposes.[63] Land use and the consequent degradation of the environment are intimately connected to the changes in the availability of both green and blue water.[64] It is estimated that '18% of the natural land cover in South Africa has been transformed …through cultivation (10%), degradation (4.5%), urban land use (1.5%) and forestry (1.4%)'.[65] The predominant source of South Africa's water is surface water, or blue water, which is supplied by rivers, streams and ground water.[66] However, the quality and quantity of this water source is by no means nearly sufficient to provide for the many needs and purposes that water sustains.[67] Other water sources include groundwater, re-used water and unconventional water sources such as desalinated seawater.[68]

Given the variety of issues facing the supply of sufficient, clean water, questions are being asked of scientists and engineers as to how to remedy these problems.[69] These questions must necessarily also be asked by the legal profession. Is the current legislative framework adequate to address these issues? If the framework is sufficient, is the implementation thereof successful? This thesis aims to address these questions in the context of the state's responsibility as trustee. This thesis also aims to address the nature of the relationship between the state, as administrator and the nation, as the user and beneficiary of water rights.

[62] Department of Water Affairs (note 48 above) 6.

[63] Department of Water Affairs (note 48 above) 7; G Jewitt (note 3 above) 891.

[64] G Jewitt (note 3 above) 891; B Van Koppen, N Jha and D J Merrey (note 17 above) 7.

[65] B Van Koppen, N Jha and D J Merrey (note 17 above) 7.

[66] A Allan (note 6 above) 426; H Thompson (note 1 above) 11.

[67] A Allan (note 6 above) 426.

[68] H Thompson (note 1 above) 11 – 12. Desalination is currently being investigated as a possible source of water for the City of Cape Town, with feasibility studies underway. See B Phakathi 'Cape Town eyes seawater option' *Business Day* 15 July 2013.

[69] See generally C E Herold (note 8 above).

3. The Research Question

It is the premise of this thesis that the parameters of the State's duty to direct socially and environmentally responsible and sustainable development of our water resources is comprised of the constitutional and statutory imperative of public trusteeship of these natural resources. Effect is given to public trusteeship in section 3 of the Water Act, which provides for the framework of public trusteeship by making the State the trustee of water, which is to be managed for the benefit of all persons. The title of section 3 is 'public trusteeship of nation's water resources'. In particular, this section requires that 'the National Government, acting through the Minister, must ensure that water is protected, used, developed, conserved, managed and controlled in a sustainable and equitable manner, for the benefit of all persons and in accordance with its constitutional mandate'. In addition, the Services Act confirms National Government's role as the custodian of water resources.[70]

Trusteeship as a legal construct, however, creates difficulties in the context of the management of water, given that it is not expressly defined by the legislative framework.[71] Thus, whether it provides the basis for a *sui generis* environmental law doctrine that regulates state conduct in the context of environmental management, or whether it is purely a consequence of the administrative functions of the state, remains uncertain. In addition, it is unclear whether trusteeship necessitates a change to the way water is classified in terms of property law. This thesis therefore aims to address the nature and content of trusteeship, as well as the nature of the relationship between the state, as the manager of water rights, and society, as the water user. In addition, it will address the question of who is responsible for the implementation of trusteeship, as well as who is intended to benefit from the implementation of trusteeship.

Given the complexity of water management in South Africa and the importance of this management being properly performed, it is imperative that the parameters of

[70] Preamble to the Water Services Act.

[71] See Ch 3 (note 181 below).

trusteeship are defined properly, given that these duties form the source of the state's obligations to manage water. As trusteeship is a new concept in the context of resource legislation, there is no assistance from the case law as to its application and interpretation; as such, section 3 has not yet been considered by the courts at all.[72] The courts recently did have the opportunity to shed light on the notion of public trusteeship and custodianship, but chose not to do so, again highlighting the need for a proper evaluation of this concept.[73] This is despite the fact that trusteeship forms the foundations upon which water management is established under the Act. Ascertaining the content of trusteeship is therefore central to properly interpreting the rest of the Act.

The objective of this thesis is to ascertain and define the parameters and content of the duties of trusteeship, which will in turn define what trusteeship is and how it operates. This entails defining the constitutional and legislative framework within which trusteeship is required to operate. Specifically, the statutory duties of the trustee are to ensure that water is protected, used, developed, conserved, managed and controlled (the duties of water management).

One of the questions which arises from the trusteeship provision is whether water should be classified as *res publicae* or *res communes omnium*, which are different categories of public property in Roman and Roman-Dutch law, and both may find application in respect of this provision.[74] The Roman and Roman-Dutch law classifications of *res publicae* and *res communes omnium* will therefore be investigated to identify whether water, as public property, can be defined as either of these concepts. Another aspect of trusteeship which is discussed is whether the

[72] E van der Schyff (note 16 above) 369 – 370.

[73] *Agri South Africa v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) para 81; *AgriSA v Minister of Minerals and Energy* (458/2011) [2012] ZASCA 93; 2012 (5) SA 1 (SCA); [2012] 3 All SA 266 (SCA); 2012 (9) BCLR 958 (SCA) (31 May 2012) para 49; E van der Schyff 'Unpacking the Public Trust Doctrine: A journey into foreign territory' (2010) 13 *PER / PELJ* 5.

[74] Similar wording is used in the Mineral and Petroleum Resources Development Act 28 of 2002. See *inter alia* P J Badenhorst and H Mostert *Mineral and Petroleum Law of South Africa* (2004) 13; P J Badenhorst and H Mostert 'Artikel 3(1) en (2) van die Mineral and Petroleum Resources Development Act, 28 van 2002: 'n Herbesoek' 2007 (4) *Tydskrif vir die Suid-Afrikaanse Reg* 469; M Van den Berg 'Ownership of minerals under the new legislative framework for mineral resource' (2009) 139 *Stell LR* 137.

public trust doctrine has been statutorily introduced.[75] This doctrine finds application in the United States of America and the extent to which this doctrine is of comparative assistance will be investigated.

The following objectives are required to be met when implementing the duties of trusteeship, namely, sustainability, equity, ensuring that use of water is beneficial and in the public interest, and finally that these duties comply with the Constitution. These objectives inform the substantive components and guiding principles of trusteeship. It is the purpose of this thesis to define these substantive principles and discuss them with reference to water management, both in terms of the theoretical requirements, as well as the practical implementation thereof.

In addition, it will be shown that a key feature of water management at a practical level is the implementation of Integrated Water Resource Management and Adaptive Management. These are approaches to the management of water which provide the tools necessary to ensure flexible decision-making processes.[76] Flexibility has been identified as being critically important in the context of environmental management, where fast reactions are necessitated by the unpredictability and uncertainty of natural systems. In this respect, the research question will address these management concepts, as well as their weaknesses and the extent to which the legal framework requires their implementation.

This thesis therefore aims to address the why, what, who, and how of trusteeship, namely:

1. Why has trusteeship been implemented?
2. What are the legal parameters of trusteeship?

[75] See E van der Schyff (note 16 above) 369; E van der Schyff 'The concept of public trusteeship as embedded in the National Water Act, 1998' (2011) *Water Research Commission* 1ff; E Van der Schyff 'Who "owns" the country's mineral resources? The possible incorporation of the public trust doctrine through section 3(1) of the Mineral and Petroleum Resources Development Act 28 of 2002' (2008) 4 *TSAR*; E Van der Schyff *The Constitutionality of the Mineral and Petroleum Resources Development Act 28 of 2002* (unpublished PhD thesis, University of Potchefstroom, 2006) 106 - 148; J Glazewski *Environmental Law in South Africa* 2ed (2005) 17 - 18; G J Pienaar and E van der Schyff (note 19 above); M I Msibi and P Z Dlamini (note 58 above) 18.

[76] See Ch 6 below.

3. Who is required to give effect to trusteeship and who are the intended beneficiaries of this system of trusteeship?
4. What are the substantive principles that inform the operation of the state's duties as trustee?
5. How does trusteeship operate in practice, that is, what are the requirements for the management of water?
6. How is trusteeship enforced?
7. What are the shortcomings of the approach to trusteeship and water management?

These questions will be addressed throughout the course of this thesis and summarised in the concluding chapter.

4. Methodology

The purpose of this thesis is to cast light on the meaning and content of public trusteeship in the context of water law. To achieve this purpose, it is useful first to provide an historical overview of water management in South Africa, as this will contextualise an evaluation of the goals of trusteeship. In particular, many of the modern water management issues are born from this historical development, namely, the inequality of access to water resources and the association between poverty and water access.

To facilitate a better understanding of trusteeship, the procedural components and substantive principles in terms of the legal framework must be established. It will also be required to set out the practical methods of management which must be employed by the state in terms of the legal framework, namely, Integrated Water Resource Management and Adaptive Management. Once the requirements of trusteeship in terms of the legal framework, substantive principles and practical implementation have been discussed, the legal remedies and oversight mechanisms will be introduced, in order to show how the state can be held accountable in terms of fulfilling its duties.

The methodology also entails an historical analysis and discussion of Roman and Roman-Dutch law, particularly the property law classifications of *res publicae* and *res communes omnium*. The purpose of this discussion is to evaluate whether the trusteeship provision, as outlined by the legal framework, entails that water is classified in accordance with these Roman law classifications. In addition, the value of defining water in accordance with either of these constructs will be discussed.

As this thesis considers the research findings of investigations into the American public trust doctrine, some reliance is placed on the legal comparative method. The purpose of discussing American jurisprudence in this respect is that trusteeship, as defined in the Act, is comparable to this doctrine given the similarities of the requirements of both. The two key features of the public trust doctrine are that the State is made custodian of the resource, which results in a fiduciary duty to manage and protect the resource, together with a 'bequest to the nation'.[77] The doctrine's origins and the manner in which it is implemented will be discussed. The comparative approach will provide a platform against which the notion of trusteeship can be evaluated in the South African context. The strengths and weaknesses of this doctrine will be analysed in order to extrapolate any lessons which may be learnt from this jurisdiction.

5. Course of Inquiry

The following is an outline of the proposed structure that will be followed in the course of the research. The aim is to address all of the research questions and underlying problems identified therein through this structure.

The current chapter provides the context and motivation for the research question. To show the necessity of this question, it sets out the inherent difficulties and challenges facing government in the context of water management. In the last two

[77] J Sax 'Liberating the public trust doctrine from its historical shackles' (1980) 14 *UC Davis LR* 188-189; J Sax 'The public trust doctrine in natural resource law: Effective judicial intervention' (1970) *Michigan Law Review* 474; E Van der Schyff 'Who "owns" the country's mineral resources?' (note 75 above) 760.

decades, there have been great changes to resource legislation. In terms of the contemporary legislative scheme, the duties of the state in relation to natural resources, particularly water, are unclear. This chapter lays the groundwork for the discussion of the research question, against the backdrop of these difficulties.

Chapter 2 discusses the history and development of water management in South Africa. It commences with a discussion of the use of water by communities of South Africa, prior to the arrival of the Dutch settlers and proceeds to consider contemporary water law. It will be argued that there have been five shifts or phases in the legal approach to water. In each of the various phases, a different approach was taken to the ownership of and access to water. Each transition or phase in the legal approach to water affected the relationship between the state and the user. The inequality of access to water under the different systems will be highlighted. This discussion will culminate in establishing the key features of modern water management within the context of the primary goals of the reformed water management system under a constitutional dispensation.

Chapter 3 discusses the legal framework that guides and informs water management. It sets out the nature of the rights created by the Constitution as well as the relevant constitutional obligations. It discusses the legislative framework that binds the state, in particular, the National Water Act and the Water Services Act. The relevant regulations enacted in terms of this legislation will also be introduced. Finally, the thesis will introduce the policies and strategies that provide the content of this legislative framework.

The purpose of **Chapter 4** is to investigate whether an historical analysis of South African law or, alternatively, a comparative analysis of foreign law can be of assistance to informing the meaning of trusteeship. It describes the concepts of *res publicae* and *res communes omnium* in South Africa. In this regard, the content of these categorisations in Roman and Roman-Dutch law is explained, in order to determine whether trusteeship as defined in the Act can be properly classed as *res publicae* or *res communes omnium*. The argument favours a classification in terms of the latter category, as the chapter explains. The chapter also introduces and discusses the public trust doctrine, with the intention of explaining its definition,

content and function. Some authors suggest that the principles underlying the public trust doctrine are analogous to trusteeship, given the similarity of its requirements, and particularly in light of key wording included in recent resources legislation (particularly 'trustee', 'benefit' and 'the people'). The two key features of the public trust doctrine are that the state is made custodian of the resource, which results in a fiduciary duty to manage and protect the resource, together with a 'bequest to the nation'.[78]

The purpose of **Chapter 5** is to highlight and discuss the substantive principles of trusteeship which arise from the legal framework discussed in Chapter 3. These principles are considered in terms of the goals of water allocation reform, as set out in the National Water Resource Strategy, namely sustainability, equity and efficiency. In particular, sustainable development, the precautionary and preventative principle, as well as the polluter-pays principle are discussed in the context of sustainability. Under the general heading of equity, the principles of inter- and intra-general equity and equality, human dignity, access to water, and the beneficial use of water are addressed. Finally, the discussion on efficiency focuses on infrastructural requirements, cooperative governance as well as the relationship between the state and the private sector.

As was stated above, the success of water management hinges on the implementation of flexibility in order to react appropriately to a constantly changing environment. In this respect, the principles of Integrated Water Resource Management and Adaptive Management may be key to ensuring that the management approach of the state is sufficiently resilient. The nature of these concepts as well as the problems identified with their implementation, are discussed in **Chapter 6.**

Chapter 7 then considers the nature of the checks and balances on the state's powers and duties in the context of water management. In this respect, the chapter discusses the relevant democratic principles, namely access to information and public participation. Furthermore, this chapter introduces the relevant

[78] E Van der Schyff 'Who "owns" the country's mineral resources?' (note 75 above) 760.

constitutional organisations, created with the specific purpose of ensuring that state conduct complies with its constitutional duties. These organisations include the South African Human Rights Commission, the Gender Equality Commission, the Public Protector and the Auditor-General. The relevant administrative rights and duties are discussed within the context of judicial review and the context of the constitutional right to just administrative action. This chapter also discusses the functions of the Water Tribunal, a legislative body established with the express purpose of providing a right of recourse against the state in relevant circumstances. Finally, the remedies that can be sought pursuant to these judicial processes are also considered.

Chapter 8 provides an analysis of the earlier chapters with the intention of highlighting the shortcomings of the current approach to water management. It will also identify possible solutions to address some of these practical issues.

Chapter 9 summarises and concludes the thesis.

Chapter Two:

HISTORICAL DEVELOPMENT OF WATER LAW

1. Introduction

The purpose of this chapter is to provide a brief overview of the development of the law governing water in South Africa from 1652 to the present. This will facilitate the discussion on water law generally and contextualise many of the changes that occurred in the legal system over this period.

This thesis aims to address the nature and content of trusteeship. In order to do so, it must address the nature of the relationship between the state (as the administrator of water resources and the rights thereto) and society (as the water user). The historical discussion in this chapter highlights the variances in this relationship over the past four centuries under the different legal regimes. It will be shown that the changes in the water management regime have been intimately linked with the social and political changes of the time.[1] This is significant in a country with both high water scarcity and huge social inequality, caused by years of political and social injustice. The role of the modern constitutional state is not only to remedy these injustices by making provision for equitable access to water, but also to ensure that the quality of water is maintained along with its associated ecosystems.[2]

This thesis argues that five distinct phases contributed towards, and eventually culminated in, the present water regime, each phase intimately linked to the

[1] See for example, D D Tewari 'A detailed analysis of evolution of water rights in South Africa' (2005) *Water World IWHA* 693-4; M I Msibi and P Z Dlamini 'Water allocation reform in South Africa: History, processes and prospects for future implementation' (2011) *Report to the Water Research Commission* 4. See also G R Backeberg 'Water institutional reforms in South Africa' (2005) 7 *Water Policy* 120.

[2] This aspect is discussed in more depth in Ch 3 and 4 below.

political and social context of the time. The first phase is characterised by African customary law prior to colonisation.[3] The second phase occurred after the arrival of the European settlers which resulted in the implementation of Roman-Dutch law. The third phase occurred once British rule over South Africa commenced. The economic and social separation of South Africans along racial lines resulted in a fourth phase of water management. Many of the infrastructural difficulties and issues of access present in water management today are attributable to the racial policies that eventually culminated in the Apartheid regime.[4] When the Apartheid legal and political system was overturned, the rights associated with water use were transformed and access to water was placed high up on the agenda of social change, resulting in the fifth phase of water management. These five phases will now be discussed in more detail.[5]

2. The Management of Water under African Customary Law

African Customary Law was not a phase of law that had any dramatic starting or ending point, unlike that of the European and British colonial systems. Instead, it was, at different stages, tolerated to various degrees by the political powers in control. Prior to colonisation, water was managed as a common resource by the local rulers of a region and access to water was allowed for all members of the community.[6] This access was regulated, where appropriate, in accordance with the interests of the entire community.[7] Nevertheless, private ownership of water was permitted in circumstances where members of a community had expended their own resources to sink a borehole. Bennett notes that traditional authorities had the

[3] See D D Tewari (note 1 above) 694-5.

[4] D Reed and M de Wit (eds) *Towards a Just South Africa: The Political Economy of Natural Resource Wealth* (2003) 1. See also G J Pienaar and E van der Schyff 'The reform of water rights in South Africa'(2007) 3/2 *Law, Environment and Development Journal* 5.

[5] For a more detailed discussion of this development, see generally D D Tewari (note 1 above) 693 - 706.

[6] L Ferris 'The public trust doctrine and liability for historic water pollution in South Africa' (2012) 8/1 *Law, Environment and Development Journal* 11.

[7] T W Bennett *Human Rights and African Customary Law* (1995) 134.

power to regulate protection of the environment and were quick to do so where 'resources were in danger of running out'.[8]

The San and Khoi-Khoi communities were the only inhabitants of the Cape region before the arrival of the European settlers.[9] The local San lived predominantly nomadic and hunter-gatherer lifestyles, and moved freely around the country.[10] The Khoi-Khoi also led a hunter-gatherer lifestyle, but kept domesticated animals, particularly cattle, which indicated status and wealth. Neither was limited in their movements, although the Khoi-Khoi, unlike the San, recognised principles akin to private ownership.[11] These two groups would be the most dramatically affected by the arrival of the European settlers.

After the arrival of the Nederlandse Oos-Indiese Kompanjie (hereinafter the "Kompanjie") in 1652, communal practices of particularly the Khoi-Khoi initially continued unimpeded, although it was regarded as an inferior system by the European settlers.[12] The settlers did not recognise the validity of the legal system of the Khoi-Khoi, nor did they recognise any rights or entitlements that they may have had, with the effect that land appropriation took place in most instances without consent or compensation.[13] The settlers appropriated more and more land forcing the local inhabitants to work on Cape farms. In the process, local communities and their way of life, were destroyed.[14]

[8] T W Bennett (note 7 above) 134.

[9] H R Hahlo and E Kahn *The Union of South Africa: The Development of its Laws and Constitution* (1960) 4.

[10] R B Beck *The History of South Africa* (2000) 10 - 12.

[11] M I Msibi and P Z Dlamini (note 1 above) 4; R B Beck (note 10 above) 4.

[12] H Thompson *Water Law: A Practical Approach to Resource Management and the Provision of Services* (2006) 126; D D Tewari (note 1 above) 695. See also T W Bennett 'African land – a history of dispossession' in R Zimmermann and D P Visser (eds) Southern Cross*: Civil Law and Common Law in South Africa* (1996) 65; E Fagan 'Roman-Dutch law in its South African historical context' in R Zimmermann and D P Visser (eds) *Southern Cross: Civil Law and Common Law in South* Africa (1996) 40.

[13] T W Bennett (note 12 above) 66. See also E Fagan (note 12 above) 36 - 37.

[14] D D Tewari (note 1 above) 695; R B Beck (note 10 above) 14 – 15, 22 – 23.

In 1806,[15] the British were awarded control of the Cape 'under cession of treaty with the Netherlands' and the British assumed that Roman-Dutch law was the applicable law.[16] In the Cape, customary law was, for the most part, no longer recognised or tolerated.[17] The British, consistent with the move to conquer more land, progressed beyond the borders of the Cape, subjugating local Xhosa-speaking communities and appropriating land and natural resources along the way.[18] While the appropriation of land and resources took place by way of treaties, it is unlikely that a genuine consensus was reached between the British and indigenous communities.[19] Often, the party who entered into these agreements did not have the authority to do so on behalf of the community. After 1847, the 'consensual' appropriation of land was abandoned, and land was instead, in most instances, violently annexed by the British.[20]

Similarly, in the Natal region, land was initially appropriated by the European settlers by way of unauthorised agreements. Following the infamous Battle of Blood River, the settlers of (mainly) Dutch origin – by that time known as the 'Boers' - declared the Republic of Natalia, which would come to be annexed by the British a short while later.[21] The regions of the Orange Free State and the Transvaal were similarly occupied by the Boer and British populations through a mixture of forced agreements, large-scale bloodshed and illegitimate annexations, leaving the remnants of the indigenous populations in tatters.[22] In contrast to the approach adopted in the Cape, customary law was left intact in Natal and the Transvaal to the extent that it was not 'repugnant to the general principles of

[15] T W Bennett (note 12 above) 66.

[16] T W Bennett (note 7 above) 18; H R Hahlo and E Kahn (note 9 above) 5.

[17] H Thompson (note 12 above) 126; T W Bennett (note 7 above) 19. For a full discussion on the extent to which the local community's rights were treated by the British, see T W Bennett 'African land – a history of dispossession' (note 12 above) 65 – 68.

[18] T W Bennett (note 12 above) 69.

[19] T W Bennett (note 12 above) 69.

[20] T W Bennett (note 12 above) 70.

[21] T W Bennett (note 12 above) 75; H R Hahlo and E Kahn (note 9 above) 6.

[22] T W Bennett (note 12 above) 77 – 80.

humanity recognised throughout the whole civilised world'.[23] In the Free State, however, customary law would not be recognised at all.[24]

In 1927, the Black Administration Act 38 of 1927 was introduced, which applied throughout the country.[25] This allowed certain courts the discretion to apply customary law in cases where both parties were black Africans.[26] As a result, customary law had an extremely limited scope of application, but it was nevertheless applied in certain contexts.[27] In reality, this Act formed part of the legislative scheme that would form the bedrock of Apartheid, as it gave the Governor-General wide powers to control the affairs of black communities.[28] The system of racial segregation that culminated in Apartheid and its effects on water resources and rights are discussed below. Despite the political, legal and social changes that would occur over the four centuries after the arrival of the first European settlers, there is evidence to show that customary practices and norms developed independently of the various colonial and Apartheid governments.[29]

Although customary practices continued despite a profoundly repressive government, traditional family structures were radically affected as a consequence of the flourishing mineral and industrial era.[30] The system of racial and social oppression that occurred in South Africa corresponded closely with the discovery of mineral wealth in the country.[31] African communities provided a rich source of

[23] T W Bennett (note 7 above) 19.

[24] P Delius 'Contested terrain: Land rights and chiefly power in historical perspective' in A Claassens and B Cousins (eds) *Land, Power and Custom: Controversies Generated by South Africa's Communal Land Rights Act* (2008) 223.

[25] Initially titled the Native Administration Act. H R Hahlo and E Kahn (note 9 above) 327.

[26] M Chanock *The Making of South African Legal Culture 1902-1936: Fear, Favour and Prejudice* (2001) 328 – 330; H Thompson (note 12 above) 126; T W Bennett (note 7 above) 19.

[27] The areas that continued for the most part without interference were the traditional customs pertaining to marriage, succession, family and land tenure. See T W Bennett (note 7 above) 20.

[28] T W Bennett (note 12 above) 82 – 83.

[29] B Van Koppen, N Jha and D J Merrey 'Redressing racial inequities through water law in South Africa: Revisiting old contradictions?' (2002) *Comprehensive Assessment Reseach Paper* 6; T W Bennett (note 7 above) 20.

[30] T W Bennett *Sourcebook of African Customary Law for Southern Africa* (1991) 150.

[31] T W Bennett (note 30 above) 151 - 152.

cheap labour that could be exploited to dig up the wealth buried deep underground, none of which enriched their own communities.[32] The system of forced migrant labour that soon became entrenched effectively broke down the family unit under African Customary Law.[33] The parties who were the most affected by this were women, who ordinarily found protection under the norms and rules of traditional African Customary Law.[34] This system was deeply rooted in paternalism and women were regarded as perpetual minors.[35] This notwithstanding, because of the family-oriented nature of traditional communities, women enjoyed greater protection in the pre-colonial society than today, even with constitutional protection.[36] Once men were forced to leave their homes to work, the traditional structures and mechanisms of regulating legal relationships disintegrated and women and children paid a heavy price for this change.[37]

Today, customary law is entrenched as a source of South African law and its importance is recognised by the Constitution.[38] In the context of water in particular, the National Water Act 36 of 1998 recognises as a continuing, legitimate right any lawful use of water that occurred prior to the introduction of this Act.[39] This is also intended to encompass lawful customary uses.[40] However, the implementation of this right in the context of customary law has been difficult, as insufficient information exists in order to genuinely classify a water use in terms of this requirement. It has been suggested that this is one of the areas that must be remedied by an amendment to the current legislation or through the

[32] T W Bennett (note 30 above) 151 - 152.

[33] See also in this respect P Delius (note 24 above) who discusses this point in the context of the role of the chiefs at 224 onwards; T Madihlaba in 'The fox in the henhouse' in D A McDonald (ed) *Environmental Justice in South Africa* (2002) 156 – 157; B Oomen *Chiefs in South Africa: Law, Power and Culture in the Post-Apartheid Era* (2005) 40.

[34] M Chanock (note 26 above) 302.

[35] T W Bennett (note 7 above) 80.

[36] T W Bennett (note 7 above) 83.

[37] T W Bennett (note 7 above) 83 – 84.

[38] S 31, 39(3) and 211(3) of the Constitution. See also T W Bennett (note 7 above) 20 – 23.

[39] S 32 – 35.

[40] See Ch 3 (note 224 below).

introduction of new legislation to give effect to the recognition of customary law in this sphere.[41]

3. The Influence of Roman-Dutch law

After the arrival of the Kompanjie in 1652, the earliest settlers relied on the laws of Holland, which were based on Roman-Dutch law, to settle any disputes.[42] In terms of the legal system implemented in Holland, public streams that flowed perennially were the property of the state.[43] Consequently, the streams flowing through what was then known as 'Table Valley' in the Cape were considered to be the property of the Kompanjie.[44] The role of the state in relation to water was that of *dominus fluminis*, which has as its literal meaning 'owner of the river', although the state's rights and duties were administrative in nature.[45] This control pertained to the regulation and use of water by the public, who were afforded access to water found in navigable streams.[46] In the context of water law, the classifications of *res publicae* and *res communes omnium* persisted in Roman-

[41] S Movik and F de Jong 'Licence to control: Implications of introducing administrative water use rights in South Africa' (2011) 7/2 *Law, Environment and Development Journal* 71.

[42] C G Hall and A P Burger *Hall on Water Rights in South Africa* 4ed (1974) 1; H Thompson (note 12 above) 33; D D Tewari (note 1 above) 695. See E Fagan (note 12 above) 33 – 64 for a discussion on the manner in which Roman-Dutch law came to be applied in South Africa. H R Hahlo and E Kahn (note 9 above) 3 and 13.

[43] C G Hall and A P Burger (note 42 above) 1 who cites Groenewegen *De Legibus Abrogatis ad Just.* 2.1.23. However, cf the discussion on ownership of water in Ch 4 p 130 below. H R Hahlo and E Kahn (note 9 above) 595.

[44] C G Hall and A P Burger (note 42 above) 1.

[45] H Thompson (note 12 above) 35; C G Hall and A P Burger (note 42 above) 1; D D Tewari (note 1 above) 696. See also A Burger 'Roman water law (part 1)' (2007) *Journal of South African Law* 72 who questions the correctness of the statement that the state owned perennially flowing water. Glazewski notes that there is not consensus as to whether the state's position was that of *dominus fluminis.* See J Glazewski *Environmental Law in South Africa* (2013) 16-10, who discusses J D van der Vyver 'The etatisation of public property' in D Visser (ed) *Essays in the History of Law* (1989) 271 – 283. E van der Schyff 'The concept of public trusteeship as embedded in the National Water Act, 1998' (2011) *Water Research Commission* 36; L Ferris (note 6 above) 11; G J Pienaar and E van der Schyff 'The public management of water resources in South Africa' (2008) *Forum on Public Policy* 3.

[46] G J Pienaar and E van der Schyff (note 4 above) 3; Voet *Commentarius ad Pandectas* 8.3.6; W J Vos *Principles of South African Water Law* 2ed (1978) 1 - 2; H Thompson (note 12 above) 35.

Dutch law, and therefore the Cape.[47] These classifications are discussed in more detail in Chapter 4.

At first, disputes pertaining to water in the Cape were very few in number, as water was only necessary for irrigation on small subsistence farm-holdings.[48] However, as the population increased, and concomitantly the demands on water usage, the need for stricter control emerged. As a result, and because of the need to manage the available water more carefully, a more stringent regime of water management developed.[49] This stricter control was asserted by a series of Placaaten that tried to balance the domestic and irrigation needs of different water users.[50] The first was published on 10 April 1655 and was directed at the prevention of pollution of streams in the Table Valley region as this water was used for drinking purposes. The second was issued in 1661 and this prevented the use of water to the detriment of the Kompanjie, including their milling operations.[51]

During this period, the *Kompanjie* retained its ownership of land and instead granted leases and freeholds to farmers and other individuals.[52] While certain pieces of land were granted by freehold to well-connected individuals, the general trend was that the state retained ownership over the land, which was leased to farmers.[53] The rights to water still had to be obtained separately and these were granted subject to there being sufficient water to furnish the *Kompanjie* gardens and mill.[54] In rural areas, water entitlements were managed by the Court of the *Landdroste* (which was responsible for the administration of a region) assisted by a Board of *Heemraden* (appointed as representatives with undefined powers and

[47] G J Pienaar and E van der Schyff (note 46 above) 3.

[48] C G Hall and A P Burger (note 42 above) 2; H Thompson (note 12 above) 33.

[49] H Thompson (note 12 above) 33.

[50] H Thompson (note 12 above) 34 – 35.

[51] C G Hall and A P Burger (note 42 above) 1.

[52] H Thompson (note 12 above) 35.

[53] C G Hall and A P Burger (note 42 above) 3.

[54] C G Hall and A P Burger (note 42 above) 1; H Thompson (note 12 above) 35.

duties),[55] who saw to apportioning water and resolving any disputes based on principles of fairness and equity.[56] The *Landdroste* and *Heemraden* were not required to have legal knowledge in order to manage water disputes.[57]

After 1761, when the Council of Policy restricted irrigation usage to four hours per day, tensions between garden owners and the governing *Kompanjie* arose.[58] In 1787, the Council of Policy established a commission to hold an enquiry into water usage in the Table Valley region. After consulting with the parties in the region, the Council of Policy extended the hours of irrigation to eight per day, subject to a rotational system of water use.[59] Thus, the nature of the relationship between the governing body and users of water was that the state held the right to administer water to users, but was mindful of accommodating their grievances.

The introduction of Roman-Dutch law principles in South Africa was potentially problematic because water rights regimes are modeled on, amongst other things, climatic and geographic considerations.[60] The legal system particularly in Holland was premised on the fact that there was an abundance of water.[61] However, this is not so in South Africa, where scarcity of water has always been of concern; as evidenced by the need to regulate water usage from as early as 1655 – only three years after the arrival of the Dutch.[62] Nevertheless, as will be shown in the following chapters, practically-speaking, the approach to water management during the reign of the Dutch East Indian Company was very similar to the

[55] On the history of the use of this terminology, see generally C G Botha 'The early inferior courts of justice at the Cape' (1921) 38 *South African Law Journal*. Botha describes the functioning of *landdroste* and *heemraden* at 408 as follows: 'As an administrative body the Court of Landdrost and Heemdraden maintained order throughout the district, saw to matters regarding rivers, watercourses, roads and bridges...'.

[56] *Garlick v Smartt and another* 1928 AD 82; C G Botha (note 55 above) 410; C G Hall and A P Burger (note 42 above) 60; H Thompson (note 12 above) 35. See also E Fagan (note 12 above) 38; H R Hahlo and E Kahn (note 9 above) 13 and 595; J W Wessels *History of the Roman-Dutch Law* (1908) 360 – 361.

[57] H Thompson (note 12 above) 35; H R Hahlo and E Kahn (note 9 above) 595.

[58] C G Hall and A P Burger (note 42 above) 1

[59] C G Hall and A P Burger (note 42 above) 2.

[60] See for example, D D Tewari (note 1 above) 694.

[61] H Thompson (note 12 above) 33.

[62] See for example, D D Tewari (note 1 above) 9 – 10.

approach today.[63] Water could not be owned and entitlements to water were granted by the state.[64] This control was managed according to supply and demand, and disputes were, for the most part, settled using principles of fairness and equity.[65] However, the local Khoi-Khoi and San population had already started to experience the hardships caused by colonisation and their rights to water and land were similarly affected.

At the turn of the 19th century, the growth of the population as well as the increase in industrial and agricultural processes had resulted in a more detailed legal approach to water management. This system of relatively well-established rules would face a rather severe shake-up with the occupation of the British in 1806 and the consequent changes to the legal system.

4. The Influence of English law

In 1806, British rule was implemented in the Cape and while, for the most part, Roman-Dutch law principles were retained, gradually certain aspects of the legal system were transformed in accordance with English law.[66] One of the primary factors that drove the development of early water law under Dutch rule was ensuring that the *Kompanjie* had sufficient water for their operations.[67] By contrast, the underlying factors that influenced the developments of water law under British rule were the economic and industrial changes occurring in South Africa, which were primarily agricultural in nature.[68] Because agriculture was one of the most important economic activities under British rule, the development of

[63] H Thompson (note 12 above) 36.

[64] C G Hall and A P Burger (note 42 above) 3.

[65] H Thompson (note 12 above) 36.

[66] J R Milton 'Ownership' in R Zimmermann and D P Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa* 658; C G Hall and A P Burger (note 42 above) 3; D D Tewari (note 1 above) 697; H R Hahlo and E Kahn (note 9 above) 17 – 18; J W Wessels (note 56 above) 363.

[67] C G Hall and A P Burger (note 42 above) 1; H Thompson (note 12 above) 35.

[68] D D Tewari (note 1 above) 700; H R Hahlo and E Kahn (note 9 above) 596.

infrastructure dramatically favoured agricultural activities.[69] The purpose of the legal changes implemented by the British was to protect and further the interests of farmers. For example, the dams built during this period were intended to service agricultural land, thus skewing land water storage patterns in favour of agricultural water use.[70] As a result, a system of water rights that favoured the state shifted to a system that favoured particular water users. This was also strongly influenced by the change in the land ownership system that took place under British rule.

Sir John Cradock's proclamation of 1813 transformed the rights of lessee's of state land, as provided for by the earlier Dutch approach, into rights of ownership thereof, in return for payment of an annual quitrent.[71] The consequence of this was to erode the idea of the state being the *dominus fluminis*.[72] The *Landdroste* and *Heemraden* were replaced with Magistrates in 1827, who did not have a broad scope to resolve water disputes in terms of English law.[73] When the Supreme Court was created in 1828, it was given the sole jurisdiction to hear water-related disputes.[74] Because it was largely the apex court who could deal with water cases, unnecessary and costly delays were caused.[75] The State, at the time, preferred to appoint members to the bench who had worked as lawyers or judges in the British Isles.[76] Their exposure to water law was exclusively anchored in British law. Consequently, the judges of the Supreme Court challenged the idea of the state's

[69] D D Tewari (note 1 above) 700; R Francis 'Water justice in South Africa: natural resources policy at the intersection of human rights, economics and political power' (2005-2006) 18 *Georgetown International Environmental Law Review* 6; M I Msibi and P Z Dlamini (note 1 above) 4.

[70] D D Tewari (note 1 above) 700.

[71] J R Milton (note 66 above) 665; C G Hall and A P Burger (note 42 above) 3; H Thompson (note 12 above) 37; D D Tewari (note 1 above) 697.

[72] C G Hall and A P Burger (note 42 above) 4; D D Tewari (note 1 above) 697.

[73] C G Hall and A P Burger (note 42 above) 3; H Thompson (note 12 above) 36.

[74] See *Myburgh v Cloete* 1847 3 Menz 564, where it was held that once the court realised that the matter was related to the rights of the parties to water, the Resident Magistrate should have found that the court did not have the requisite jurisdiction to hear the matter; D D Tewari (note 1 above) 697; H Thompson (note 12 above) 36.

[75] C G Botha (note 55 above) 411.

[76] C G Hall and A P Burger (note 42 above) 3; H Thompson (note 12 above) 36; D D Tewari (note 1 above) 697.

role as *dominus fluminis*, instead placing emphasis on individual entitlements based on the principles of riparianism – a notion with which they were far more familiar.[77] Disputes were therefore dealt with in terms of the ordinary principles of land rights, and not in relation to the Roman-Dutch law system where the state held the property rights to manage and administer water.[78] In 1848, Resident Magistrates became competent to hear water-related disputes by virtue of Ordinance 5 of 1848. They were, however, not empowered to change existing water entitlements or 'enforce any new distribution of water'.[79]

In 1856, a riparian system[80] of water ownership was formally implemented by the courts in the case of *Retief v Louw*[81] rendering the state's role as *dominus fluminis* nugatory.[82] Generally, the riparian system did not afford holders thereof ownership of water, but rather a usufructuary right to take a portion of water that ran over or adjacent to their land.[83] The introduction of a riparian system to South Africa was problematic as it was not well-suited to conditions where water was scarce.[84] Rivers in the British Isles flow constantly, even if they are small rivers. This is not true of South Africa, where the flow of rivers is erratic and weather-dependent and the unpredictability of the weather can result in droughts for many years.[85]

[77] H Thompson (note 12 above) 36; DD Tewari (note 1 above) 697.

[78] C G Hall and A P Burger (note 42 above) 4.

[79] C G Botha (note 55 above) 411.

[80] For a discussion on the disadvantages of the riparian system, see A Burger (note 45 above) 75 – 77; L Ferris (note 6 above) 11.

[81] 1874 Buchanan 165 as cited by C G Hall and A P Burger (note 42 above) 4. See also A Burger (note 45 above) 72 who outlines the history of the riparian system and how it came to be adopted into South African law.

[82] G J Pienaar and E van der Schyff (note 4 above) 3; GJ Pienaar and E van der Schyff 'Watergebruikregte ingevolge die Nasionale Waterwet 36 van 1998' (2003) *Obiter* 135; D D Tewari (note 1 above) 694 and 697; S Movik and F de Jong (note 41 above) 69; H R Hahlo and E Kahn (note 9 above) 596.

[83] S Movik and F de Jong (note 41 above) 69.

[84] H Mackay 'Water policies and practices' in D Reed and M de Wit (eds) *Towards a Just South Africa: The Political Economy of Natural Resource Wealth* (2003) 55 – 56; D D Tewari (note 1 above) 700; G J Pienaar and E van der Schyff (note 45 above) 3.

[85] H Thompson (note 12 above) 36.

In the context of riparianism, the Chief Justice of the Cape Colony handed down a judgment in *Hough v van der Merwe*[86] distinguishing between public and private streams. Some authors state that De Villiers CJ held that public streams are to be classified as *res communes omnium.*[87] However, the judgment does not expressly refer to either *res communes omnium*[88] or *res publicae.*[89] Instead, the judgment finds that water: [90]

> drawn from a river into vessels, or into ponds, becomes private property; but to admit of such property with respect to the river itself, considered as a complex body, would be inconsistent with the public interest, by putting it in the power of one man to lay waste a whole country. 'A river may be considered as the common property of the whole nation; but the law declares against separate property of the whole or part'.

It is unclear from this dictum whether De Villiers CJ is referencing the concept of *res publicae* or *res communes omnium.* The importance of this distinction will become apparent in Chapter 4. This notwithstanding, in terms of this classification, the use of water from public streams was not limited to riparian land owners only.[91] In addition, water that flowed over an owner's land was also public while water that arose on their land was essentially private in nature.[92] Running water was divided into perennially (flowing all year around) and non-

[86] 1874 Buchanan 148 as cited by C G Hall and A P Burger (note 42 above) 5.

[87] D D Tewari (note 1 above) 698; H Thompson (note 12 above) 38.

[88] *Res communes* consists of unowned property such as running water, air and the ocean that belonged to all - Justinian *The Institutes of Justinian – Book II: The Law of Property* § 146; R W Lee *The Elements of Roman Law* 4ed (1956) 35, 43; R W Leage *Roman Private Law Founded on the 'Institutes' of Gaius and Justinian* 2ed (1909) 122; E Poste *Elements of Roman Law by Gaius* 3ed (1890) 152; P J Badenhorst, J M Pienaar and H Mostert *Silberberg and Schoeman's The Law of Property* 5ed (2006) 33; T C Sanders *The Institutes of Justinian* 7ed (1934) xlviii; G J Pienaar and E van der Schyff (note 45 above) 3.

[89] *Res publicae* is public property which collectively belonged to and was used by a civil community. These include rivers with perennial flow, public streets and squares, harbours and highways - D. i. 8. 4. 1.; D xlvii. 10. 13. 17 - *Flumina autem omnia et portus publica sunt: ideoque jus piscandi omnibus commune est in portibus fluminibusque* - T Sanders *The Institutes of Justinian* (1962) 91; A M Prichard (note 19 above) 154; E Poste (note 10 above) 147; M Kaser (note 12 above) 101; R W Leage (note 10 above) 122; D H Van Zyl (note 20 above) 128; A Borkowski and P du Plessis (note 14 above) 154; D Nasmith (note 18 above) 403-404.

[90] 154.

[91] H Thompson (note 12 above) 38.

[92] Although, Thompson notes that the courts did not yet distinguish between public and private types of water. Instead, water that arose on a property owner's land was susceptible to the free use by the owner. See H Thompson (note 12 above) 38.

perennially flowing water.[93] Water which flowed all year around was subject to the system of riparian rights, while non-perennial water was privately owned and capable of complete control.[94] The courts confirmed that in order for a river to be classed as perennial, it was not necessary for it to flow continuously, 'provided that there was a usual flow throughout the length of the river's course'.[95] This principle was not consistently applied by the courts, with some courts rejecting the requirement that a water source be perennial, and instead requiring that the flow of a stream be 'something more than a mere surface drainage'.[96] It would later also become possible for water that flowed through a known and defined channel, even if man-made, to be classified as a public stream.[97]

Under the Roman-Dutch notion of *dominus fluminis*, the state controlled and authorised use of perennial water. However, under British rule, the state had very little to do with the management and control of the water. Instead, riparian owners were entitled to use this water as a matter of law, and without state authorisation, subject to certain conditions such as reasonable use.[98] Further, the rules that governed the use of water in this context were developed not by the state, but by the courts.[99]

Further statutory introductions drove the development of the legal principles regulating water use. In 1894, the Transvaal departed from the common law through the enactment of Law 11 of 1894 by including non-perennial water within the scope of public water.[100] The first specialist water courts to be created and provided with the jurisdiction to hear water-related disputes were introduced

[93] C G van der Merwe *Law of South Africa* (2001) Vol 27 First Re-issue para 216.

[94] D D Tewari (note 1 above) 698.

[95] C G Hall and A P Burger (note 42 above) 15 discussing *Southey v Schombie* (1880-1881) 1 EDC 286.

[96] H Thompson (note 12 above) 39 citing *Van Heerden v Wiese* (1880-1884) Buch AC 5 16.

[97] H Thompson (note 12 above) 99 – 40 discussing *Myburgh v van der Bijl* 1882 1 SC 360.

[98] D D Tewari (note 1 above) 698; H R Hahlo and E Kahn (note 9 above) 596.

[99] D D Tewari (note 1 above) 699.

[100] C G Hall and A P Burger (note 42 above) 5.

following the implementation of Act 40 of 1899 in the Cape.[101] The Cape later followed the changes made by the Transvaal by enacting Act 32 of 1906, which widened the scope of public streams to include non-perennial streams within the purview thereof, also legislatively confirming the riparian principle.[102]

After the conclusion of the Anglo-Boer war between the British and the Boer population (1899 – 1902), the four colonies consisting of the Orange Free State, the Cape and Natal Colonies, and the Transvaal, formed a Union.[103] The formation of the Union was significant in that the amalgamation of the four colonies represented the English and Afrikaans communities uniting to 'protect their common economic interests' by excluding black South Africans.[104]After the formation of the Union in 1910, the Irrigation and Conservation of Waters Act Act 8 of 1912 was introduced, which was the first legislation to govern the entire South African area.[105] This Act further entrenched the distinction between private and public water.[106] The Act also provided that non-perennial streams were to be considered public, contrary to the position before, provided that the water was commonly used by downstream users.[107]

Specialist water courts were introduced throughout the country, consisting of a Judge and technical experts who could assist in the decision as to what constituted reasonable water use under the Act.[108] A distinction between normal and surplus

[101] C G Hall and A P Burger (note 42 above) 5.

[102] The Natal and Free State would continue to follow the common law until 1912. C G Hall and A P Burger (note 42 above) 6; A Burger (note 45 above) 74.

[103] J R Milton (note 66 above) 658; H Thompson (note 12 above) 55; D Reed and M de Wit (note 4 above) 21; H R Hahlo and E Kahn (note 9 above) 7.

[104] D Reed 'Historical overview of institutional and political arrangements' in D Reed and M de Wit (eds) *Towards a Just South Africa: The Political Economy of Natural Resource Wealth* (2003) 21.

[105] The distinction between private and public water was adopted in the Cape Colony in 1906 in the Cape Irrigation Act Act 32 of 1906, but was recognised in 1912 by the Union. See D D Tewari (note 1 above) 699; M I Msibi and P Z Dlamini (note 1 above) 4; H R Hahlo and E Kahn (note 9 above) 597.

[106] R Lyster and P Lazarus 'The problem with ground water in South African law' (1995) 112 *South African Law Journal* 447; G J Pienaar and E van der Schyff (note 4 above) 3; H Thompson (note 12 above) 55; G J Pienaar and E van der Schyff (note 45 above) 3.

[107] C G Hall and A P Burger (note 42 above) 17.

[108] H Thompson (note 12 above) 56; H R Hahlo and E Kahn (note 9 above) 267.

flow was also introduced, which replaced the more complicated distinction made under the 1906 Act between perennial and intermittently flowing streams.[109]

The common law defined perennial rivers as public, even if they were not navigable.[110] The Act confirmed the limitation of a riparian owner's usage of perennial water subject to the 'natural rights of the public'.[111] However, the Act went even further than the common law by providing that even non-perennial water could be public water provided the river had a defined channel and was 'capable of common use by the riparian owners for irrigation'.[112] The distinctions drawn and the rules regulating public and private streams were still largely concerned with the agricultural use thereof as public streams were required to provide sufficient water for the production of crops 'economically and regularly'.[113] Further, where streams were technically classified as private but were found to be the sources of public streams, the owner's use was limited insofar as they were not entitled to do with the water as they pleased,[114] also with the intention of ensuring sufficient water was available for riparian users.

One of the unintended negative effects of the system implemented under British rule was ironically felt in the agricultural sphere, despite the emphasis of legal developments to enable farming activities. The parameters of riparianism made storage of water difficult, as it was too expensive for an owner to justify the storage of only his proportionate share.[115] As a result, plenty of useful fresh water flowed out to sea.[116] In order to curtail this waste, a distinction was made between

[109] C G Hall and A P Burger (note 42 above) 6; A Burger (note 45 above) 74; H R Hahlo and E Kahn (note 9 above) 596.

[110] C G Hall and A P Burger (note 42 above) 17.

[111] S 7(a) of the Water Act; *Van Heerden v Wiese* 1 Buch. A.C. 5 as discussed in C G Hall and A P Burger (note 42 above) 17; *Mostert Snr and another v S* [2010] 2 All SA 482 (SCA) para 9.

[112] S 1(xiv) as discussed in C G Hall and A P Burger (note 42 above) 17. See also *Southey v Southey* (1905) 22 SC 650.

[113] C G Hall and A P Burger (note 42 above) 18.

[114] C G Hall and A P Burger (note 42 above) 21 discussing (1880-1884) Buch AC 5 16.

[115] *Smartt Syndicate, Ltd v Richmond Municipality* Krummeck's Reports 285; W J De Vos *Elements of South African Water Law* (1968) 4 – 5; H Thompson (note 12 above) 56.

[116] *Smartt Syndicate Ltd v Richmond Municipality* Krummeck's Reports 285; W J De Vos (note 115 above) 4 – 5; H Thompson (note 12 above) 56.

surplus and normal flow water.[117] Normal flow was the ordinary amount of water that was susceptible to reasonable use by the riparian owner.[118] Surplus flow, by contrast, was any additional water that could be stored over and above the reasonable amount in times of flooding, and as much water could be used as was reasonable under the circumstances.[119]

Another failure of the riparian system was that the apportionment of water rights came to be wholly regulated by the courts, resulting in a chaotic system that stymied development by the state.[120] By the middle of the 20th century, the state was completely hamstrung and had been forced to enact over 40 pieces of legislation to circumvent court orders and allow water-related projects to continue.[121] Furthermore, domestic and industrial water needs were placed after agricultural water needs, which was unacceptably out of touch with the modern requirements.[122] To remedy these defects in the legislative scheme, the Water Laws Enquiry Commission was created, resulting in the introduction of the Water Act 54 of 1956.[123]

The Water Act 54 of 1956 was introduced during the reign of the Apartheid government and returned the state to the position of *dominus fluminis* in respect of public water.[124] The Minister of Water Affairs was given broad powers to administer the use of public water and private water could not be transferred

[117] C G Hall and A P Burger (note 42 above) 14 who discusses *Smartt Syndicate Ltd v Rischmond Municipality and others* (1919) Krummeck's Reports 284; H Thompson (note 12 above) 56.

[118] *Smartt Syndicate Ltd v Richmond Municipality* Krummeck's Reports 285; W J De Vos (note 115 above) 4 – 6.

[119] W J De Vos (note 115 above) 11 – 12; H Thompson (note 12 above) 56; H R Hahlo and E Kahn (note 9 above) 597.

[120] C G Hall and A P Burger (note 42 above) 83; D D Tewari (note 1 above) 699.

[121] H Thompson (note 12 above) 58 – 59; D D Tewari (note 1 above) 699. See for example – Hartbeespoort Irrigation Scheme (Crocodile River) Act 32 of 1914; Hartbeespoort Irrigation Scheme (Acquisition of Land) Act 23 of 1918; Riparian Land (Erven and Commonages) Act 11 of 1919; Bedford Additional Water Supply (Private) Act 13 of 1919, Rand Mines Power Supply Company Water Supply (Private) Act 14 of 1919, Marico-Bosveld Irrigation Scheme Act 10 of 1932, Durban Waterworks Consolidation (Private) Act 24 of 1921.

[122] C G Hall and A P Burger (note 42 above) 7.

[123] C G Hall and A P Burger (note 42 above) 7.

[124] C G Hall and A P Burger (note 42 above) 9; D D Tewari (note 1 above) 701.

without authorisation from the Minister.[125] The effect of rapid industrialisation and urbanisation highlighted the problems with the riparian system, which was better suited to purely agricultural purposes, in a country with regular water flow.[126] As a result, there was a shift away from this system, although it was not immediately abolished,[127] and the scope of water uses and users was increased.[128] The government could declare areas, in accordance with the public or national interest, over which it would have control.[129] Water-stressed basins could also be declared Government Water Control Areas, in terms of which a water-use authorisation had to be granted prior to use.[130] The nature of the right that was awarded did not amount to ownership, but was rather a *usufruct.*[131]

The distinction between public and private water persisted in the Water Act[132] and the rules relating to the use of public water were further defined according to agricultural, urban and industrial uses.[133] Groundwater could be classified as either public or private by the Act, and where the Act was silent, it fell to be decided by the common law.[134] The distinction between surplus and normal flow in the context of public water was also retained.[135] The ownership of private water

[125] S 1(ix), and s 2 read with s 5(2) of the Water Act.

[126] H Thompson (note 12 above) 62; D D Tewari (note 1 above) 701; H R Hahlo and E Kahn (note 9 above) 598.

[127] S 1(xvii) of the Water Act defines riparian land, in the context of a public stream, as 'land held under an original grant or deed of transfer of such a grant or under a certificate of title, whether surveyed in one lot or more than one lot, whereon or along any portion of any boundary whereof a public stream exists, and any subdivision of land' or 'crown land in respect of which no original grant has been made, but the situation of which in relation to a public stream would have rendered it riparian thereto..'. D D Tewari (note 1 above) 701.

[128] W J De Vos (note 115 above) 1.

[129] C G Hall and A P Burger (note 42 above) 8. For example, subterranean water (s 28), government water control areas (s 59) and irrigation districts (s 71 and s73), government drainage control areas (s 59 (5)) catchment control areas (s 59 (2)), dam basin control areas (s 59 (4) (a)) and water sport control areas as discussed in D D Tewari (note 1 above) 701.

[130] H Mackay (note 84 above) 55; S Movik and F de Jong (note 41 above) 69.

[131] S Movik and F de Jong (note 41 above) 69; G R Backeberg (note 1 above) 113.

[132] R Lyster and P Lazarus (note 106 above) 443.

[133] See s 1; D D Tewari (note 1 above) 701; H Mackay (note 84 above) 50; W J De Vos (note 115 above) 1, 8 – 9.

[134] D D Tewari (note 1 above) 701.

[135] S 1(xi) read with s 53(2) of the Water Act 54 of 1956; H Thompson (note 12 above) 62; W J De Vos (note 115 above) 3 – 8.

was significantly regulated by the introduction of the 1956 Act, as the owner of land was no longer able to dispose freely of this water without first obtaining the consent of the Minister.[136] These limitations also included a statutory restriction on the pollution of water by an owner.[137]

Private water was defined by the Water Act as 'all water which rises or falls naturally on any land',[138] which included spring water, rain water, drainage water (provided it did not join a public stream), underground water and the water from a private stream.[139] Private water continued to fall outside the scope of government control, and if water arose on an owner's land, they had the exclusive use and control there over, subject to the limitations mentioned above.[140]

The definition of 'public water' in terms of the 1956 Act included all water in a known and defined channel, provided that the water could be used by common riparian landowners for the purposes of irrigation.[141] Public streams continued to be incapable of being privately owned[142] and were defined as 'a natural stream of water which flows in a known and defined channel'.[143] However, this water was freely available for use by the riparian landowner subject to the ordinary principles of this doctrine.[144] The riparian landowner did not own this water and it still fell to be classified as public.[145] Public water was defined as 'any water

[136] S 5 of the Water Act read with s 2 of Act 45 of 1972; C G Hall and A P Burger (note 42 above) 22; R Lyster and P Lazarus (note 106 above) 443; H R Hahlo and E Kahn (note 9 above) 599.

[137] S 21, 22 and 23 of the Water Act.

[138] S 1(xiii) read with s 5 of the Water Act.

[139] S 1 read with s 5; W J De Vos (note 115 above) 1.

[140] S 5(1); H Thompson (note 12 above) 63; W J De Vos (note 115 above) 1.

[141] S 7; W J De Vos (note 115 above) 3.

[142] S 6(1) of the Act provided that 'there shall be no right of property in public water and the control and use thereof shall be regulated as provided in this Act'. See also *Mostert Snr and another v S* [2010] 2 All SA 482 (SCA) para 22.

[143] S 1(xiv).

[144] W J De Vos (note 115 above) 2.

[145] W J De Vos (note 115 above) 2; De Vos refers to this type of water as *res communis*, which he describes as 'similar to the air and the sea'.

flowing or found in or derived from the bed of a public stream, whether visible or not'.[146]

The rules relating to normal and surplus flow in the context of public water were further complicated by the distinction drawn between primary, secondary and tertiary uses in the context of normal flow of water.[147] For normal water flow, the general rule was that primary water use entitlements allowed riparian owners to a reasonable amount of use for domestic needs.[148] Any limitations to primary uses of water were published in the Government Gazette.[149] A riparian owner would be entitled to use a reasonable share of water for secondary purposes, which consisted of irrigation and agricultural purposes, as well as urban uses, if this did not affect any downstream owner's primary use of water.[150] Tertiary uses were permissible if the downstream owner's secondary use was not affected and these consisted of water use for mechanical or industrial use.[151] When dealing with the surplus flow of water, a riparian owner did not have to take into account the downstream user's needs in the context of primary and secondary uses, unless the downstream user could show that their rights were 'adversely affected'.[152] The storage of water was still regulated, and the storage of water from a normal flow water source was only permissible if it was temporary.[153] An owner required permission from the court to store water for tertiary purposes.[154] All of the aforementioned rights were afforded to riparian owners.[155]

[146] S 1(xv); C G Hall and A P Burger (note 42 above) 19.

[147] H Thompson (note 12 above) 57.

[148] W J De Vos (note 115 above) 8; H Thompson (note 12 above) 57.

[149] S 62(2B).

[150] S 9(1) and s 62(2I)(a)(ii); W J De Vos (note 115 above) 9; H Thompson (note 12 above) 57.

[151] H Thompson (note 12 above) 57.

[152] S 10(1) read with s 19 and s 52; W J De Vos (note 115 above) 13; C G Hall and A P Burger (note 42 above) 69.

[153] S 9(1) and (2), and 1(xix); C G Hall and A P Burger (note 42 above) 15.

[154] H Thompson (note 12 above) 57.

[155] W J De Vos (note 115 above) 10.

Non-riparian water users, on the other hand, were limited to use of public water for 'the support of human and animal life' but could request permission from the water courts or the Minister of Water Affairs[156] for access to water for other purposes.[157] Permission could be granted, provided that it was in the public interest to do so, or that there was a 'superabundance of water' within a catchment area.[158]

A number of remedies were available to a person with water rights to ensure that these rights were protected.[159] Parties could apply to the court for the award of an interdict under specified circumstances.[160] Aggrieved parties could also apply to the Water Court for relief relating to the declaration of rights or an apportionment thereof, which involved defining the water rights in question.[161] Where a party suffered loss, a damages claim could be instituted, based on the ordinary Aquilian principles for liability.[162] Furthermore, criminal sanctions could be imposed against those who unlawfully took more water than they were entitled to or who wasted public water.[163]

5. The Effect of Social and Economic Racial Segregation on Water Infrastructure

One of the more devastating consequences of the riparian system was the resultant inequality of access to water.[164] Water rights were associated with land ownership, which entrenched this inequality after the Black Land Act of 1913 was implemented, when land came to be predominantly owned by the white minority

[156] S ix.

[157] S 11(2) of the Water Act. See also W J De Vos (note 115 above) 10.

[158] S 11 of the Water Act. See also W J De Vos (note 115 above) 14.

[159] For a discussion on the remedies available under modern law, see Ch 7 p 250 below.

[160] S 61 of the Water Act.

[161] S 60 and 62 of the Water Act.

[162] S 171 of the Water Act; W J De Vos (note 115 above) 36 – 37.

[163] W J De Vos (note 115 above) 18 – 19.

[164] M I Msibi and P Z Dlamini (note 1 above) 5.

of the country.[165] The effect of moving from what was essentially an administrative system under Roman-Dutch law to a riparian system under English law in this context was wholly to disenfranchise non-white people in terms of water rights.[166] Over 91% of the country came to be owned by white people through this shift, resulting in the complete subjugation of the black majority throughout the country.[167]

Prior to the introduction of democracy in 1994, two legal systems ensured the economic and social separation of the South African people as a consequence of the Apartheid government's attempt to create a truly segregated society divided along racial lines.[168] The policies aimed at the social separation of different races commenced long before the formal introduction of Apartheid.[169] These legal systems also followed geographic boundaries, as the government created ten administrative regions called 'Homelands'.[170] The majority of South Africa's black population was forcefully removed and arbitrarily squeezed into these comparatively small regions after the introduction of the Black Land Act of 1913.[171] The primary legal system consisted of the laws that governed the country,

[165] T W Bennett 'African land – a history of dispossession' (note 12 above) 81; D Reed and M de Wit (note 4 above) 19; M I Msibi and P Z Dlamini (note 1 above) 7; R Francis (note 69 above) 7. Other legislation that would entrench this divide included the Urban Areas Act 21 of 1923, Native Laws Amendment Act 54 of 1952 and the three Group Areas Acts 41 of 1950, 36 of 1956 and 77 of 1957 – see H Mostert *Mineral Law: Principles and Policies in Perspective* (2012) 35; S Liebenberg *Socio-economic Rights: Adjudication Under a Transformative Constitution* (2010) 2 – 3.

[166] D D Tewari (note 1 above) 699; G J Pienaar and E van der Schyff (note 4 above) 183.

[167] D D Tewari (note 1 above) 699.

[168] D Reed (note 104 above) 21; B Van Koppen, N Jha and D J Merrey (note 29 above) 3; R Francis (note 69 above) 3.

[169] G M Fredrickson *White Supremacy: A Comparative Study of American and South African History* (1982) 239 – 240.

[170] R B Beck (note 10 above) 4; B Van Koppen, N Jha and D J Merrey (note 29 above) 3. See also D Hallowes and M Butler 'Power, poverty and marginalized environments' in D A McDonald (ed) *Environmental Justice in South Africa* (2002) 65 – 67, who discusses the impact on communities in terms of gender relations, forced migration and health.

[171] H Mostert (note 165 above) 35; B Van Koppen, N Jha and D J Merrey (note 29 above) 3; D Reed and M de Wit (eds) (note 4 above) 19; S Movik and F de Jong (note 41 above) 69.

many of which sought to entrench racial division and subjugation.[172] The secondary legal system regulated the Homeland areas.[173]

Legislation was used to entrench the social divide along racial lines, depriving non-white South Africans from access to resources, whilst at the same time forcing them into a system of cheap labour and poor education.[174] The common law offered no respite to those being subjugated. The legal systems in Rome and Holland were premised on systems of entitlements based on wealth and status. As Liebenberg states, there was[175]

> [L]imited scope for challenging the systemic injustices of the apartheid era through the common law. The common law had no tradition of recognising entitlements to social and economic resources and services on the basis of need. The closest that the pre-constitutional common law comes to protecting people's access to social benefits and resources is within the context of administrative law.

Despite nearly 20 years of democracy, the institutional remnants of these two systems are still problematic.[176] The infrastructural development under each of these systems was markedly different. The pre-1994 Department of Water Affairs served the former 'white South Africa', particularly the commercial sector, which was highly subsidised.[177] Over a few decades, a well-established system of water rights was established for commercial farmers, mining companies and other industries, thereby ensuring access to water for these purposes.[178] Access to all natural resources was regulated and restricted by the white government with the result that 'the *environment* was seen to be a white, suburban issue of little

[172] B Van Koppen, N Jha and D J Merrey (note 29 above) 3.

[173] B Van Koppen, N Jha and D J Merrey (note 29 above) 3.

[174] See S Liebenberg (note 165 above) 2 – 7.

[175] S Liebenberg (note 165 above) 4.

[176] See *Mazibuko and others v City of Johannesburg and others* 2010 (4) SA 1 (CC) para 10 and para 87; *Federation for Sustainable Environment and Another v Minister of Water Affairs and Others* (35672/12) [2012] ZAGPPHC 140 (26 July 2012) para 9; B Van Koppen, N Jha and D J Merrey (note 29 above) 3; T Humby and M Grandbois 'Human right to water in South Africa and the *Mazibuko* decisions' (2010) 51 *Les Cahiers de Droit* 526.

[177] D Reed (note 104 above) 23; B Van Koppen, N Jha and D J Merrey (note 29 above) 5; P Mukheibir and D Sparks 'Water resource management and climate change in South Africa: Visions, driving factors and sustainable development indicators' (2003) *Report for Phase I of the Sustainable Development and Climate Change Project* 3.

[178] B Van Koppen, N Jha and D J Merrey (note 29 above) 5.

relevance to the anti-apartheid struggle. At worst, environmental policy was seen as an explicit toll of racially based oppression'.[179] Environmental protection and policies were preservationist in nature with a focus on wildlife.[180] The result of these policies and attitudes of the controlling elite gave rise to an 'environmental racism', where black people were viewed as destructive to the environment as compared to the conservationist white population.[181]

Water management was vested in the Homeland governments in the Homeland regions, who were to a large extent, simply puppets of the Apartheid state.[182] Tribal councils and chiefs were the delegated authorities for managing water and some drinking water supply schemes were implemented in the rural areas.[183] Some state- and parastatal-funded enterprises were established with the intention of furthering irrigation schemes. However, many of these schemes collapsed after support was withdrawn by the various governments in 1990. The lack of bargaining power in these regions was also evident where mining companies, for example, would negotiate with community leaders for access to water for the purposes of mining projects. However, these companies would often completely disregard their contractual obligations by polluting a community's water with no intention of remedying the situation.[184]

These separate legal systems gave rise to wholly different infrastructural systems of water supply and management in different regions.[185] One of the challenges of water management today is to acknowledge that these differences still exist. As a

[179] D A McDonald *Environmental Justice in South Africa* (2002) 1.

[180] D A McDonald (note 179 above) 15 – 17. See also L Ferris 'Environmental rights and *locus standi*' in A Paterson and L Kotze (eds) *Environmental Compliance and Enforcement in South Africa* (2009) 129 who notes the pre-constitutional approach where preservation of the environment at the cost of human rights resulted in hostility amongst the rural communities towards environmental goals.

[181] D A McDonald (note 179 above) 17 - 19.

[182] R Francis (note 69 above) 21; B Van Koppen, N Jha and D J Merrey (note 29 above) 5; S Liebenberg (note 165 above) 5.

[183] A R Turton 'Water demand management: A case study from South Africa' (1999) *MEWREW Occasional Paper No. 4* 6.

[184] B Van Koppen, N Jha and D J Merrey (note 29 above) 6.

[185] G J Pienaar and E van der Schyff (note 4 above) 4 – 5; B Van Koppen, N Jha and D J Merrey (note 29 above) 6.

result, a uniform approach to water management is not necessarily appropriate.[186] Some of the problems that face more developed areas are concerns of pollution, flooding and soil erosion.[187] However, in the less developed areas, mere access to water is of greatest concern.[188] Consequently, the needs of large-scale and small-scale water users, as well as urban and rural users will be vastly different.[189] It is therefore vital that, against this historical background of systemic and entrenched inequality of access, the needs of all of various water users are taken into account using a flexible system when implementing an integrated approach to water management as required by the Act.

6. Water Management After the Advent of the National Water Act and the Water Services Act

After the African National Congress was voted into power in 1994, the political system anchored in parliamentary sovereignty was replaced with a constitutional democracy.[190] An interim Constitution introduced in 1993 was replaced with the final Constitution in 1996, which included a fully justiciable Bill of Rights, including both civil and political rights, as well as socio-economic rights.[191] Included amongst these rights was an express recognition of the right to an environment that is not harmful to health or well-being as well as the right of access to water.[192] This allows parties the requisite *locus standi* to challenge the

[186] B Van Koppen, N Jha and D J Merrey (note 29 above) 8.

[187] B Van Koppen, N Jha and D J Merrey (note 29 above) 7.

[188] Water Research Commission 'Water and society: Upscaling community-based partnerships in South Africa' (2014) *Technical Brief* 1.

[189] B Van Koppen, N Jha and D J Merrey (note 29 above) 8.

[190] S Liebenberg (note 165 above) 1; E Bray 'Administrative justice' in A Paterson and L Kotzé (eds) *Environmental Compliance and Enforcement in South Africa* (2009) 157.

[191] See S Liebenberg (note 165 above) 16 - 19.

[192] S 24 and 27 respectively, as discussed in Ch 3 (note 34 and 68 below).

state in terms of environmental issues, including those related to the management of water.[193]

The introduction of the National Water Act and the Water Services Act, in accordance with the constitutional directives, completely revolutionised South Africa's approach to water governance, with the effect that South Africa now has arguably the most progressive legislation on water management in the world.[194] The changes implemented represent a shift away from the Roman-Dutch, English and Apartheid regimes that entrenched inequality.[195] When the White Paper that informed the National Water Act was introduced, the Minister of Water Affairs and Forestry at the time captured the essence of the dilemma that faced the management of water as well as the required response: [196]

> South Africa's water law comes out of a history of conquest and expansion. The colonial law-makers tried to use the rules of the well-watered colonising countries of Europe in the dry and variable climate of Southern Africa. They harnessed the law, and the water, in the interests of a dominant class and group that had privileged access to land and economic power. It is for this reason that the new Government has been confronted with a situation in which not only have the majority of South Africa's people been excluded from the land, but they have been denied either direct access to water for productive use or access to the benefits from the use of the nation's water. The victory of our democracy now demands that national water use policy and the water law be reviewed. Our Constitution demands this review, on the basis of fairness and equity, values which are enshrined as cornerstones of our new society.

The task of overhauling the legal system and facilitating basic rights of access to water was, and remains, a daunting task.[197] The priorities of the new approach to water management were to facilitate access to water for all and for the water

[193] W du Plessis and A A du Plessis 'Striking the sustainability balance in South Africa' in M Faure and W du Plessis (eds) *The Balancing of Interests in Environmental Law in Africa* (2011) 425.

[194] For a discussion of the history and build up to the introduction of the National Water Act, see H Mackay (note 84 above); S Movik and F de Jong (note 41 above) 68; M I Msibi and P Z Dlamini (note 1 above) 5; R Francis (note 69 above) 16; J Glazewski 'The rule of law' in D A McDonald (ed) *Environmental Justice in South Africa* (2002) 193.

[195] G R Backeberg (note 1 above) 118.

[196] Minister K Asmal *Introduction to the White Paper* (Department of Water Affairs and Forestry, 1997a: 2).

[197] For example, it is estimated that approximately R70 billion per year is required to ensure the functioning of our water infrastructure. See Ch 3 (note 253 below).

systems in place to alleviate poverty and eradicate inequality, whilst recognising the need for economic growth and development, as well as the need to protect and preserve the environment.[198] This was consistent with the broader approach adopted by the African National Congress, upon being democratically elected into power, who wanted to improve not only the political rights of the South African people, but also their standard of living and quality of life.[199]

Ironically, the state is again the '*dominus fluminis'* of water resources to the extent that it is legally entitled and required to manage and administer water rights.[200] It does not own this water[201] and the nature of the water right is a usufruct, similar to the system under Dutch rule.[202] While the nature of the relationship between the state and the user of water, as well as the nature of the rights to water is similar, there are many substantive and procedural differences between these systems.

In the context of water management over the past 400 years, the state has been the primary mechanism driving the entrenchment of political and social inequality along racial lines. In order to rectify this imbalance, the modern constitutional state has been designated the role of the trustee of water, the content of which trusteeship is to be interpreted consistently with the Constitution.[203] Trusteeship was introduced by way of section 3 of the National Water Act, whereby the state has been tasked with the duty of ensuring the protection, use, development, conservation, management and control of water.[204] Similarly, the Water Services Act makes the state the custodian of water in the context of the provision of water

[198] S Movik and F de Jong (note 41 above) 69; R Francis (note 69 above) 15; P Mukheibir and D Sparks (note 177 above) 7.

[199] D A McDonald (note 179 above) 2; E van der Schyff 'The concept of public trusteeship as embedded in the National Water Act, 1998' (2011) *Water Research Commission* 47.

[200] E van der Schyff 'The concept of public trusteeship as embedded in the National Water Act, 1998' (2011) *Water Research Commission* 47.

[201] See Ch 4 (note 119 below); *Mostert Snr and another v S* [2010] 2 All SA 482 (SCA) para 22.

[202] R Francis (note 69 above) 18; B Schreiner, G Pegram and C von der Heyden 'Reality check on water resources management: Are we doing the right things in the best possible way?' (2009) 11 *Development Planning Division (Working Paper Series)* 177.

[203] S 3 of the National Water Act.

[204] A Kok and M Langford et al 'Water' in S Woolman, T Roux et al (eds) *Constitutional Law of South Africa* 2ed (revised 2012) 56B-23.

services.[205] The ownership of this collective water has been debated, with some commentators arguing that ownership vests in the nation.[206] While many countries around the world debate whether privatisation of water resources may be a viable mechanism for the management and conservation of water, South Africa has very clearly and purposefully created a human right to water, which cannot be owned, and which is managed by the state for the benefit of the people.[207]

As stated above, the distinction between private and public water has been abolished[208] consistent with the introduction of a human right to water.[209] The implications of this abolition, particularly in the context of poverty and land ownership, are important, as access to water is now no longer secured by land ownership.[210] Furthermore, it is no longer possible to hold an exclusive entitlement to water.[211] Instead, authority has to be granted by the relevant departmental official and this authorisation remains conditional on a number of factors,[212] including that it is beneficial and in the public interest.[213] This process must allow for public participation and decisions can be taken on review by aggrieved parties.[214] This is consistent with the shift towards a strong focus on the

[205] Preamble read together with s 11(1) of the Water Services Act.

[206] A Kok and M Langford (note 204 above) 56B-23; G J Pienaar and E van der Schyff (note 4 above) 183 – 184; E van der Schyff 'Unpacking the public trust doctrine: a journey into foreign territory' (2010) 13 *PER / PELJ* 124.

[207] K Bakker 'The 'commons' versus the 'commodity': alter-globalization, anti-privatization and the human right to water in the Global South' (2007) 39 *Antipode.*

[208] The Preamble to the National Water Act states the following: 'Recognising that while water is a natural resource that belongs to all people, the discriminatory laws and practices of the past have prevented equal access to water, and use of water resources'; H Mackay (note 84 above) 52; G J Pienaar and E van der Schyff (note 4 above) 1; M I Msibi and P Z Dlamini (note 1 above) 5.

[209] S 27(1)(b) of the Constitution.

[210] A Kok and M Langford (note 204 above) 56B-23. For a discussion on the water poverty index, see C Sullivan 'Calculating a Water Poverty Index' (2002) *World Development;* See also A Gowlland-Gualtieri 'South Africa's water law and policy framework: Implications for the right to water' (2007) 3 *International Environmental Law Research Centre* 4.

[211] G J Pienaar and E van der Schyff (note 4 above) 181; A Kok and M Langford (note 204 above) 1; W Amien and M Paleker 'Women's Rights' (1997 – 1998) 8 *South African Human Rights Journal* 334.

[212] See Ch 3 (note 228 below).

[213] R Francis (note 69 above) 18.

[214] R Francis (note 69 above) 18.

utilisation of water such that it is preserved for ecological gains whilst promoting the goals of democracy.[215] Water demand management is also more strongly recognised.[216]

In addition to the removal of the distinction between public and private water, the unity and-interdependence of the water cycle has been recognised.[217] The distinctions drawn between different types of water prior to the advent of the Act[218] resulted in a rather complex approach to water use and management, which arbitrarily distinguished between different types of water. A distinction is no longer made between ground, surface and other kinds of water,[219] and the differentiation between water based on the source and location thereof has been recognised as arbitrary.[220] The water cycle is not only complex but also consists of many different systems and sources, which are affected by many different factors.[221] The water cycle, with all its various stages, sources and stresses is referred to as the hydrological cycle.[222] The complexity of this cycle is accordingly recognised by the Act,[223] consistent with the principles that laid the foundations for the new water law.[224]

The state recently reiterated the importance of treating water as a single entity, and further, appreciating the interdependence of water within the greater context

[215] H Mackay (note 84 above) 57; B Van Koppen, N Jha and D J Merrey (note 29 above) 10.

[216] B Van Koppen, N Jha and D J Merrey (note 29 above) 10.

[217] The Preamble to the Act states as follows: 'Recognising that water is a scarce and unevenly distributed national resource which occurs in many different forms which are all part of a unitary, inter-dependent cycle; Recognising that while water is a natural resource that belongs to all people, the discriminatory laws and practices of the past have prevented equal access to water, and use of water resources. A Gowlland-Gualtieri 'South Africa's water law and policy framework: Implications for the right to water' (2007) 3 *International Environmental Law Research Centre* 3.

[218] R Lyster and P Lazarus (note 106 above) 443.

[219] C de Coning 'Overview of the water policy process in South Africa' (2006) 8 *Water Policy* 517.

[220] R Lyster and P Lazarus (note 106 above) 442 and 451.

[221] H Thompson (note 12 above) 3 – 5, 11.

[222] See Ch 3 (note 284 below).

[223] H Thompson (note 12 above) 4.

[224] H Thompson (note 12 above) 4; J Glazewski *Environmental Law in South Africa* 2ed (2005) 428.

of the ecosystem and the various users dependent on this system.[225] This sentiment is reflected in the National Water Policy, which aims to consolidate the National Water Act and Water Services Act to 'enable the Minister, the department, water management and service institutions, and water users to have a clearer understanding of legislative aspirations and requirements regarding water across the entire water value chain, and will prevent the need for the cross-reading between the two acts'.[226]

Due to the practices of the past, developmental goals did not take into account the effect on the environment, and consequently ecosystems, habitats and critical biodiversity have been damaged and destroyed.[227] In order to mitigate the consequences of years of development at the expense of the environment as well as the social inequities caused by colonisation and Apartheid, several mechanisms have been introduced. For example, the Act introduces the 'Reserve', which stipulates the minimum amount of water required to sustain human and ecological health.[228] In addition, the powers and duties of water management have been delineated to specific catchment management areas, in order to focus the management of water to the area in question. Pursuant to this, the state has also implemented Integrated Water Resource Management, which aims to integrate and coordinate the management of water, and Adaptive Management, which encourages a management approach to water that is flexible and can accommodate uncertainties.[229] The Act binds all organs of state, and requires cooperative governance between the different entities.[230] Public participation and community involvement is not only encouraged, but also demanded in certain contexts, in

[225] Department of Water Affairs *National Water Resource Strategy* 2ed (2013) [hereinafter 'Strategy (2013)'] 37.

[226] GN 888 of 30 August 2013: National Water Policy Review - Updated policy positions to overcome the water challenges of our developmental state to provide for improved access to water, equity and sustainability.

[227] Strategy (2013) 37. See below at Ch 5 (note 4 below).

[228] See below at Ch 3 (note 328 below).

[229] See generally Ch 6 below.

[230] S 156.

terms of water management.[231] These concepts will be discussed in the following chapters.

The Water Services Act provides that everyone has the right of access to a basic water supply, which it defines as 'the prescribed minimum standard of water supply services necessary for the reliable supply of a sufficient quantity and quality of water to households, including informal households, to support life and personal hygiene'.[232] The Act places the onus on the relevant water service institution to realise this right of basic access to water supply, within the context of reasonableness (which is discussed in Chapter 3).[233] The National Water Act and the Water Services Act are discussed more fully in Chapter 3.

7. Concluding Remarks

The purpose of this chapter has been to set out the historical development of the legal system pertaining to water and to highlight the inequalities that developed in the context of access to water as a result of the political imbalance in power between the state and the people. Prior to the colonisation of South Africa, water was governed by the independent African customary laws of each of the different tribes in a particular area.[234] In accordance with modern day constitutional principles, African customary law is still a relevant consideration for water management, and therefore the state, as trustee, must take cognisance of this source of law.[235]

The arrival of the European Settlers in the Cape saw the beginnings of the fracturing of South African society along racial lines.[236] Following their arrival,

[231] J Glazewski (note 224 above) 428; B Van Koppen, N Jha and D J Merrey (note 29 above) 10.

[232] S 3(1) read with s 1.

[233] S 3(2).

[234] Note 7 above.

[235] Note 38 above.

[236] Note 14 above.

Roman-Dutch law was implemented in a piecemeal fashion.[237] The Roman-Dutch law classifications, such as *res publicae* and *res communes omnium,* were received into South African law as a consequence.[238] The state as *dominus fluminis* was responsible for the administration of water, and only very few water sources could be privately owned in accordance with the Roman-Dutch law rules.[239] The development of water law was largely influenced by the needs of the *Kompanjie* at the time, as well as the agricultural requirements for water use.[240] Consequently, the nature of the relationship between the state and water users favoured the state.

After the British took control over the Cape, a riparian system of water use was implemented, which catapulted land ownership to the forefront of water entitlements.[241] The courts, rather than the state, came to be the party in control of determining the intricacies of water entitlements, in accordance with the principles of riparianism.[242] The nature of the relationship between the state and the user therefore favoured particular water users, that is, riparian land owners. This system was extended to the rest of South Africa after the Union came into existence in 1910, and the first legislation dealing with water in the country was enacted.[243] In the context of the burgeoning industrial and urban sectors, this state of affairs soon became untenable, with the result that the Water Act was implemented in 1956.[244]

At the same time, the parallel political developments taking place saw the coming into power of the Apartheid government and the full-scale racial segregation of the population commenced.[245] The Apartheid government restored itself to the

[237] Note 42 above.

[238] Note 47 above.

[239] Note 45 above.

[240] Note 54 above.

[241] Note 77 above.

[242] Note 78 above.

[243] Note **Error! Bookmark not defined.** above.

[244] Note 123 above.

[245] Note 174 above.

position of *dominus fluminis* and could therefore once again administer water rights.[246] The distinction between public and private water was, however, maintained, and the system of riparianism persisted within the bounds of the Water Act.[247] With the legislative introduction of the Homelands, most of the land in the country came to be owned by the white minority.[248] Simultaneously, the development of water infrastructure favoured agricultural and industrial development in the hands of white people.[249] Thus, while the nature of the relationship between the state and the user still favoured the user, the water users in question represented a fraction of the population.

After the institution of democracy in South Africa and the abolition of Apartheid, addressing inequality of access to water is at the forefront of the government's agenda.[250] The Constitution, the National Water Act and the Water Services Act came into force, thereby abolishing the distinction between public and private water, and the associated riparian system.[251] Land ownership is no longer a prerequisite for access to water.[252] Instead, equitable access is a primary goal of water management.[253] In addition, a key feature of modern water management is the recognition that water is a finite resource that is affected by multiple factors and stakeholders.[254] The unity of the water cycle is now properly recognised and the party responsible for the management of water in the interests of the public is the state, in its capacity as public trustee.[255] The nature of this relationship is intended to favour all water users equitably, efficiently and sustainably, and the state is responsible for ensuring that this occurs.[256] The legal framework, as well

[246] Note 182 above.

[247] Note 132 above.

[248] Note 170 above.

[249] Note 177 above.

[250] Note 198 above.

[251] Note 208 above.

[252] Note 210 above.

[253] Note 208 above.

[254] Note 221 above.

[255] Note 222 above.

[256] See, generally, Ch 5 below.

as the principles and philosophies that underlie this system, will be the focus of the discussion in the following chapters. The importance of the state as the party responsible for remedying the inequalities of the past 400 years and ensuring the environmental preservation of the resource will be discussed against the backdrop of the above discussion.

Chapter Three:

THE LEGAL FRAMEWORK FOR THE REGULATION OF WATER

1. Introduction

South Africa's political history is fraught with racial suppression and an inequality of access to natural resources.[1] When the political transition to a constitutional democracy took place in 1994, the primary focus of the incumbent ANC state was to redress this inequality of access.[2] With this in mind, and with the constitutional right of access to water entrenched in the Constitution of the Republic of South Africa in 1996 (hereinafter the 'Constitution'), the National Water Act (hereinafter the 'Water Act') and the Water Services Act (hereinafter the 'Services Act') were implemented in quick succession. The implementation of the Water Act saw many complicated and unnecessary Acts and policies repealed, thereby simplifying the process of regulating water.[3] A unified approach to water management was adopted, with its foundations anchored in the obligations created by the Constitution.[4] At the helm of this water management is the state, newly appointed to its guardianship role as trustee. Similarly, the Services Act confirmed the role of the state as the custodian of water in the context of the provision of water services.[5]

This unification has simplified water law by rationalising or abolishing the multitude of different rules and regulations that would previously have been

[1] See discussion at Ch 2 above.

[2] Speech delivered by the Minister of Water Affairs and Forestry, Kader Asmal, *Introduction to the White Paper* (Department of Water Affairs and Forestry, 1997 a: 2).

[3] J Glazewski *Environmental Law* 2ed (2005) 437.

[4] S 24 and 27.

[5] Preamble read together with s 11(1) of the Water Services Act.

considered.[6] However, the Water Act and the Services Act have created an interpretive difficulty: it left the concept of public trusteeship or custodianship (hereinafter referred to as 'trusteeship') open for speculation.[7] The legislation prior to the Act did not employ the concept of trusteeship, and the legislation does not expressly define what is meant by this notion.

Given that there is no express definition of trusteeship in either the Constitution or the legislation (that is, the Water Act and Services Act), a part of the purpose of this thesis is to establish what trusteeship entails. This chapter intends to provide an overview of the legal framework that governs domestic water management.[8] As will be shown below, the provisions of the Water Act that introduce trusteeship deal with the management of water resources. Consequently, it is argued in this thesis that the duties of trusteeship, in the narrow sense, are no more than the requirements as set out by the legal framework to manage and administer water resources. The parameters within which trusteeship must be viewed are clearly set out by the Constitution, legislation and associated regulations, as well the National Water Resources Strategy, which is published in accordance with the Water Act. The framework is hierarchical, consisting of three levels,[9] and each of these different levels will be discussed below. The substantive components of trusteeship, that is, the principles that underlie water management, are informed by this legal framework and will be discussed in Chapter 5.

Due to the scope of this thesis, this discussion is limited to domestic law. However, international law and regional water agreements also form an integral part of the framework of considerations in water management,[10] and the Water

[6] S 163 read with sched 7.

[7] See note 182 below.

[8] See the discussion by M Kidd on the nature of South Africa's environmental law sources. He points out that the majority of these sources are anchored in legislation as the common law is relatively undeveloped in this sphere - M Kidd *Environmental Law* 2ed (2011) 20.

[9] The Department of Water Affairs, however, obtains its jurisdictional powers from the Constitution, the National Water Act and the Water Services Act. See Department of Water Affairs *National Water Resource Strategy* 2ed (2013) [hereinafter 'Strategy (2013)'] 70.

[10] It is constitutionally mandated that international law be taken into account [s 39(1)(b), s 233]. Strategy (2013) Ch 11. See M Kidd (note 8 above) 45 – 67 on international law and the environment generally. See also F Craigie, P Snijman and M Fourie 'Dissecting environmental

Act specifically provides that international obligations must be met.[11] South Africa shares most of its largest water sources, amounting to almost 60% of the country's water sources, with Botswana, Mozambique, Lesotho, Namibia, Swaziland and Zimbabwe.[12] In this respect, shared water sources are very carefully governed by political agreements between these countries to ensure the cooperative management of these rivers.[13] In the context of shared water sources, the development of these countries is intimately linked. Upstream users essentially hold the power in relation to downstream users' water supply.[14] Over-use or pollution of water sources upstream will result in the deterioration and destruction of water ecosystems downstream.[15] Consequently, it must be borne in mind that water management must take place within the context of these international obligations.[16]

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compliance and enforcement' in A Paterson and L Kotze (eds) *Environmental Compliance and Enforcement in South Africa* (2009) 47; J Glazewski *Environmental Law in South Africa* (2013) 16-6 – 16-7; L Ferris 'The public trust doctrine and liability for historic water pollution in South Africa' (2012) 8/1 *Law, Environment and Development Journal* 14 argues that public trusteeship requires respecting 'water allocation for downstream users in shared river basins'.

[11] Under the old water regime, the riparian rights of users upstream (in this instance both South African and Swazi water users) did not have to be considered where the river source started in South Africa and then ran through Swaziland before re-entering South Africa – see C G Hall and A P Burger *Hall on Water Rights in South Africa* 4ed (1974) 18 discussing *Barberton Municipality v C.T. Andrews and Son, Ltd and others* (1929) Hall's Reports 243. However, s 2(i) of the National Water Act requires the state to meet its international obligations. For example, s 27(j) requires the responsible party to consider whether the quality of water required in terms of international obligations could be affected prior to the award of a licence or authorisation for water use. Similarly, s 102 - 108 of the Act allows the Minister to establish bodies for the purposes of implementing international agreements. The Strategy (2013) 30 also focuses on the importance of managing water in the context of regional agreements. See also H Thompson *Water Law: A Practical Approach to Resource Management and the Provision of Services* (2006) 137, 151 – 152.

[12] G R Backeberg 'Water institutional reforms in South Africa' (2005) 7 *Water Policy* 110; Strategy (2013) 67 and 80.

[13] G R Backeberg (note 12 above) 110. See also B Schreiner, G Pegram and C von der Heyden 'Reality check on water resources management: Are we doing the right things in the best possible way?' (2009) 11 *Development Planning Division (Working Paper Series)* 7.

[14] Strategy (2013) 38.

[15] Strategy (2013) 38.

[16] The international bodies and commissions that have been created have no management institutions in terms of the National Water Act. Some of the international bodies that have been created are the Joint Permanent Technical Committee between South Africa and Botswana, the Cross Border Water Supply Agreement between South Africa and Botswana, the Lesotho Highlands Water Project, The Permanent Water Commission between South Africa and Namibia, the Joint Water Commission between Swaziland and South Africa, the Joint Development and

This chapter describes the existing legal mechanisms for water management. It commences with a consideration of relevant constitutional provisions. Thereafter, it deals with ordinary legislation and regulations. It also looks at the strategic and policy choices underpinning the existing framework.

2. Legal Mechanisms for Water Management: The Constitution

The basis for the hierarchy that guides and informs the framework of trusteeship consists of the obligations enumerated by the Constitution.[17] The Constitution was introduced in 1996 with the intention of, amongst other things, drastically overhauling the legal approach to socio-economic rights.[18] The inclusion of the right to water was a first internationally, and South Africa has been used as an example by the United Nations in its attempts to encourage other states to adopt a constitutional right to water.[19] A water right, which is incorporeal in nature,[20] has been defined by one author as 'a right to a share in the resource defined by the holder's priority of use, the amount that may be taken, a guarantee of the quality of the water, the source of the water to be used, and the right to change the place

Utilisation of the Water Resources of the Komati River Basin between Swaziland, Mozambique and South Africa, the Joint Water Commission between South Africa and Mozambique, the Limpopo Watercourse Commission between South Africa, Botswana, Mozambique and Zimbabwe, the Tripartite Interim Agreement between South Africa, Mozambique and Swaziland. See Strategy (2013) 67; H Mackay 'Water policies and practices' in D Reed and M de Wit (eds) *Towards a Just South Africa: The Political Economy of Natural Resource Wealth* (2003) 82; M I Msibi and P Z Dlamini 'Water allocation reform in South Africa: History, processes and prospects for future implementation' (2011) *Report to the Water Research Commission* 7.

[17] M Kidd (note 8 above) 20.

[18] *The Director: Mineral Development, Gauteng Region, and Another v Save The Vaal Environment and Others* 1999 (2) SA 709 (SCA) para 20; see also J Glazewski 'Environment' in Cheadle et al *South African Constitutional Law: The Bill of Rights* (2002) 409.

[19] A Kok and M Langford et al 'Water' in S Woolman, T Roux et al (eds) *Constitutional Law of South Africa* 2ed (revised 2012) 56B-1.

[20] H Klug 'Water law reform under the new Constitution' (1997) 1 *Human Rights and Constitutional Law Journal of Southern Africa* 6; F Soltau 'Environmental Justice, water rights and property' (1999) *Acta Juridica* 239; M Kidd (note 8 above) 88.

and manner of abstraction'.[21] This right is not unlimited and its correlative obligation is that it is subject to regulation by the state in the public interest.[22] Trusteeship, therefore, must give effect to this right by balancing the needs of different water uses within the context of ensuring that water users are afforded access to a certain quantity and quality of water.

Whilst there is concurrent competence between the national and provincial legislature in the context of management of the environment,[23] the same cannot be said for water management. In this respect, the exclusive competency lies with the national sphere.[24] This is consistent with the fact that the management of water is not allocated along artificial political lines, but rather in accordance with catchment management areas.[25] In respect of water and sanitation services, the local government is competent to regulate 'potable water supply systems and domestic waste-water and sewage disposal systems'.[26]

Before discussing the rights created by the Constitution in more detail, it is germane to explain why the Constitution is binding. Not only is the Constitution the 'cornerstone of our democracy',[27] but section 2 thereof also provides that it is the supreme law and any law or conduct that is inconsistent with the Constitution is invalid.[28] The Constitution furthermore requires the state to 'respect, protect, promote and fulfil the rights in the Bill of Rights' and this obligation is binding on

[21] F Soltau (note 20 above) 239. However, see specifically s 31 of the Act, which provides that the award of a licence does not guarantee the quality or quantity of water, as discussed below at note 252. See also I T Winkler *The Human Right to Water* (2012) 8 – 11.

[22] H Klug (note 20 above) 6; M Kidd (note 8 above) 88. See also I Currie and J de Waal *The Bill of Rights Handbook* 6ed (2013) 34.

[23] See M Kidd (note 8 above) 31. Water and sanitation services fall within Sch 4 Part B and are therefore local government matters.

[24] See note 81 below; F Craigie, P Snijman and M Fourie (note 10 above) 67.

[25] See note 94 below.

[26] Sched 4 part B of the Constitution read with s 156 of the Constitution; Local Government: Municipal Systems Act 32 of 2000; F Craigie, P Snijman and M Fourie (note 10 above) 68.

[27] S 7 of the Constitution.

[28] S 2 of the Constitution; *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs* 2004 (5) SA 124 (W) 141.

all levels and spheres of government.[29] The consequence of this is that the Constitution requires the state, at all levels, to act consistently with the goals contained therein. Accordingly, these goals form the core of the values that must guide the objectives of water management. They operate at all times and must be borne in mind by decision-makers in all facets of water management.

As was discussed in Chapter 2, the legacy of Apartheid ensured that poverty, land ownership and access to water are inextricably linked.[30] As a result, the Bill of Rights includes specific provisions that have bearing both on the quality of environmental resources, as well as the right of access thereto. Section 24 and 27 of the Constitution are pertinent in this regard, as they provide the guidelines that must inform all water management decisions.[31] All management decisions must be consistent with these constitutional imperatives, an obligation reiterated by the Water Act and the Services Act. In terms of the Water Act, the Minister acting on behalf of the National Government, as public trustee, must facilitate this process by ensuring that all decisions are constitutionally compliant and further the constitutional mandate.[32] The Services Act makes no reference to the Minister acting on behalf of the National Government. Instead, the National Government is the stipulated custodian.[33]

2.1. Section 24 of the Constitution

Section 24[34] of the Constitution focuses on the right to protection of the quality of the environment. It provides that everyone has a right to an environment that is

[29] S 7 and 8(1); *Democratic Alliance and others v Acting NDPP and others* [2012] 2 All SA 345 (SCA) para 31; G E Devenish *A Commentary on the South African Bill of Rights* (1999) 29.

[30] See 40 above; A Kok and M Langford (note 19 above) 56B-1, 56B-22. See also J Glazewski (note 18 above) 423; M I Msibi and P Z Dlamini (note 16 above) 25; B Dodson 'Searching for a common agenda' in D A McDonald (ed) *Environmental Justice in South Africa* (2002) 98.

[31] H Thompson (note 11 above) 134 - 135.

[32] S 3.

[33] The preamble to the Water Services Act '[confirms] the National Government's role as custodian of the nation's water resources'.

[34] Everyone has the right-

(a) to an environment that is not harmful to their health or well-being; and

not harmful to their health or well-being.[35] This right is not limited to citizens or persons who are legally entitled to be in South Africa, but is afforded to anyone physically present within the borders of the Republic.[36]

The use of the term 'well-being' within the context of this clause creates a constitutional right that is 'potentially limitless'.[37] The court in *HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others*[38] (the *'HTF Developers'* case*)* described the use of this term as 'critically important in that it defines for the environmental authorities the constitutional objectives of their task'.[39] However, a 'potentially limitless' standard is not necessarily useful for authorities in carrying out their day-to-day administrative functions. This is

> (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that-
>
> (i) prevent pollution and ecological degradation;
>
> (ii) promote conservation; and
>
> (iii) secure ecologically sustainable development and use of natural resources
>
> while promoting justifiable economic and social development

[35] S 24(a); H Thompson (note 11 above) 135. For a discussion on the build-up to the introduction of an environmental right in the bill of rights, see M Kidd 'Environmental law' (1993) 4 *South African Human Rights Year Book* 112; R Ramlogan *Sustainable Development: Towards a Judicial Interpretation* (2011) 144.

[36] See I Currie and J de Waal (note 22 above) 34. In *Mohamed v President of the Republic of South Africa* 2001 (3) SA 893 (CC) para 54 – 60, the court refused to extradite a Tanzanian national who potentially faced the death penalty in the United States of America, on the basis that he was entitled to the rights under s 10, 11 and 12 of the Constitution. Similarly, in *Lawyers for Human Rights v Minister of Home Affairs* 2004 (4) SA 125 (CC) para 26 and 27, the court held that foreign nationals who were physically present in the country were entitled to the protection afforded by the Bill of Rights, even if they were not yet allowed to formally enter the country; G E Devenish (note 29 above) 21. By contrast, the Mineral and Petroleum Resources Development Act 28 of 2002, which makes the State the custodian of all mineral resources, specifically states that the benefit of this custodianship is for South Africans only.

[37] 86; J Glazewski (note 18 above) 415; *HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2006 (5) SA 512 (T) 18; J Glazewski 'The rule of law' in D A McDonald (ed) *Environmental Justice in South Africa* (2002) 175 – 176. See also H Thompson (note 11 above) 136. However, see also L J Kotzé 'Environmental governance' in A Paterson and L Kotzé (eds) *Environmental Compliance and Enforcement in South Africa* (2009) 103 - 108 who discusses the difficulties with the use of terminology such as 'sustainability', 'governance' and 'environmental governance' because they are ill-defined. W du Plessis and A A du Plessis 'Striking the sustainability balance in South Africa' in M Faure and W du Plessis (eds) *The Balancing of Interests in Environmental Law in Africa* (2011) 428.

[38] 2006 (5) SA 512 (T).

[39] 18. See also M Kidd (note 8 above) 23, who points out that the term 'well-being' is so broad that it could also include one's spiritual well-being or the impact of aesthetic considerations on a person's well-being.

even more the case in light of the criteria of the rule of law, which requires, *inter alia*, the law to provide certainty.[40]

It is argued that this component of the right must be read in light of the requirement of 'sustainable development', also contained in section 24. Sustainable development requires the balancing of social, economic and environmental goals.[41] It also requires the promotion of justifiable development. The weighing of these factors will assist in ensuring that legitimate economic and social development is not stymied by what could effectively amount to a trump card in favour of the environment. Consequently, this section of the Constitution requires the needs of society, particularly its well-being, to be evaluated in the context of environmental and economic goals.

The second component of section 24 focuses on the protection and preservation of the environment[42] to which everyone is similarly entitled.[43] Not only must the environment be protected for the present generation, but also for future generations.[44] In order for the state to meet its constitutional duties, section 24 requires positive steps to be taken to ensure the fulfillment of the right.[45] This requires the implementation of legislative and other measures. These measures must aim to ensure that pollution and ecological degradation are prevented.[46] Secondly, these measures are required to promote conservation of the environment.[47] In *Khabisi NO and Another v Aquarella Investment 83 (Pty) Ltd and Others*[48] the court held that this component of section 24 expressly requires

[40] *Pharmaceutical Manufacturers Association of South Africa and another: In Re Ex Parte President of the Republic of South Africa and others* 2000 (2) SA 674 (CC) para 39; *Democratic Alliance and others v Acting NDPP and others* [2012] 2 All SA 345 (SCA) para 29.

[41] See at Ch 5 (note 4 below); W du Plessis and A A du Plessis (note 37 above) 429.

[42] S 24(b); M Kidd (note 8 above) 22; M Kidd (note 35 above) 112.

[43] I Currie and J de Waal (note 22 above) 34.

[44] S 24(b).

[45] S 24(b)(i – iii). See G R Backeberg (note 12 above) 1 – 2. See also discussion below (note 118) in the context of the decision of *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC).

[46] S 24(b)(i).

[47] S 24(b)(ii).

[48] 2008 (4) SA 195 (T).

the state to 'promote conservation and protect the environment'.[49] Finally, the third component requires the implementation of sustainable development, which entails the use of natural resources for development purposes, such that the need to protect the environment is balanced against the need to promote economic and social development.[50]

In addition to sustainable development, this aspect of the constitutional right introduces a number of components to water management that must be complied with, including intra- and inter-generational equity, as well as the principles pertaining to the protection of the environment. These principles are discussed in Chapter 5 under the substantive aspects of trusteeship.[51]

In the context of section 24, and more particularly, in the context of the discussion of trusteeship, the Constitutional Court has defined the role of the courts in fulfilling the goals of sustainable development. In particular, the Court stated as follows:[52]

> The role of the courts is especially important in the context of the protection of the environment and giving effect to the principle of sustainable development. The importance of the protection of the environment cannot be gainsaid. Its protection is vital to the enjoyment of the other rights contained in the Bill of Rights; indeed, it is vital to life itself. It must therefore be protected for the benefit of the present and future generations. The present generation holds the earth in trust for the next generation. This trusteeship position carries with it the responsibility to look after the environment. It is the duty of the court to ensure that this responsibility is carried out.

A number of observations can be made from this dictum in the context of trusteeship. The courts have established that they, too, are charged with the duty to ensure that the responsibilities of trusteeship are properly carried out, thereby

[49] Para 30; F Craigie, P Snijman and M Fourie (note 10 above) 46 – 47.

[50] S 24(b)(iii).

[51] See Ch 5 below.

[52] *Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others* 2007 (10) BCLR 1059 (CC) para 102; *MEC: Department of Agriculture, Conservation and Environment and another HTF Developers (Pty) Limited* 2008 (4) BCLR 417 (CC) para 28. See also *HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism and others* [2006] ZAGPHC 132 para 19 and E van der Schyff 'Stewardship doctrines of public trust: Has the eagle of public trust landed on South African soil? (2013) 130 *South African Law Journal* 371.

confirming the court's responsibilities in terms of oversight of state conduct.[53] In addition, the court acknowledges the critical interrelationship between the well-being of society and the preservation of the environment. In this respect, the court also acknowledges that the future well-being of society is intimately linked to the availability of environmental resources, thus requiring the preservation and protection of natural resources. The court further indicates that trusteeship is key to furthering this aim, and to the success of sustainable development.

The court establishes this position of trusteeship independently of any legislative provision. Instead, trusteeship, per this dictum, is a by-product of the recognition in the Bill of Rights of the importance of the environment to the preservation of humanity. In the *HTF Developers* case[54] the court held that section 24 'confers upon the authorities a stewardship, whereby the present generation is constituted as the custodian or trustee of the environment'.[55] Trusteeship, therefore, is all-pervasive: it is a duty bestowed on the judiciary, the state and society. Arguably, therefore, trusteeship is a constitutional doctrine, even if only in the context of environmental protection of water resources. At this broad level, it is argued that trusteeship operates in a wide sense, independently of the statutory framework.

This approach was confirmed in *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs* ('BP'),[56] where the court held that the state's administrative functions are intertwined with its constitutional obligations.[57] The supremacy of the Constitution required the state to comply with its constitutional obligations in performing its duties, failing which its actions would be invalid.[58] Consequently, the state is obliged to consider environmental factors in its administrative functions, such as the award of licences; it is insufficient for the state merely to comply with the procedural requirements for the award of licences.

[53] See also Ch 8 (note 59) below.

[54] 2006 (5) SA 512 (T).

[55] Para 19.

[56] 2004 (5) SA 124 (W).

[57] 142.

[58] BP 150.

In the context of the state's administrative duties, the court in the *BP* case held that the goal of sustainable development required that measures must be implemented by the state for the purposes of achieving these goals.[59] Secondly, the state must consider all relevant factors when exercising these administrative duties, which include the nature of the harm that will be suffered by the environment, and the extent to which this can be minimised or avoided altogether.[60]

The court in the *BP* case also found that the decision-making process regarding natural resources must consider the potential impacts, not only on the environment, but also on socio-economic conditions as well as cultural factors.[61] As a result, the court highlighted the importance of incorporating cultural factors into the decision-making process. The National Environmental Management Act 107 of 1998 also requires that 'environmental management must place people and their needs at the forefront of its concern, and serve their physical, psychological, developmental, cultural and social interests equitably'.[62]

The decision-making process, the court highlighted, had to take into account all relevant factors.[63] Where the empowering provision is silent on what these relevant factors are, the administrator must be guided by the nature of the power that is being exercised. In the context of decisions pertaining to water, the legal framework will provide the specific requirements that have to be considered. The court did however point out that the weight of these different factors, unless expressly stated by legislation, was discretionary and the court could not interfere in this regard.[64]

[59] BP 150.

[60] BP 150.

[61] BP 151.

[62] S 2(3) of the NEMA. See, however, L J Kotzé (note 37 above) 113 in terms of the application of the NEMA within the context of water law, which is unclear, particularly in the context of pollution.

[63] BP 155.

[64] BP 155.

The Supreme Court of Appeal expressed similar views in the case of *The Director: Mineral Development, Gauteng Region, and Another v Save the Vaal Environment and Others*.[65] The court in its discussion of section 24 stated: [66]

> Our Constitution, by including environmental rights as fundamental, justiciable human rights, by necessary implication requires that environmental considerations be accorded appropriate recognition and respect in the administrative processes in our country. Together with the change in the ideological climate must also come a change in our legal and administrative approach to environmental concerns.

The court thus expressed the view that with the advent of the Constitution, the legal approach to environmental issues had changed, and the administrative approach had to follow accordingly.[67]

2.2. Section 27 of the Constitution

Whilst section 24 focuses on the quality of environmental resources, section 27[68] aims to ensure *access* to these resources. This provision directs the state to ensure that persons are afforded access to sufficient water,[69] and a duty is created in terms of how this access is to be ensured by the government thereby creating tangible goals that must be satisfied by the state. Similarly to section 24, reasonable legislative and other measures must be introduced by the state. Section 27, however, goes further than section 24 by not only requiring the implementation of reasonable legislative and other measures, but also by requiring

[65] 1999 (2) SA 709 (SCA).

[66] Para 20.

[67] Para 20.

[68] (1) Everyone has the right to have access to-

(a) health care services, including reproductive health care;

(b) sufficient food and water; and

(c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

[69] S 27(1)(b); H Thompson (note 11 above) 145 – 146.

this right to be progressively realised.[70] The onerous nature of the duty to give effect to the right of access to water is limited, however, by the fact that the state's duties only need be fulfilled to the extent that the available resources exist to meet these goals.[71] By contrast, section 24 does not have this same safeguard in terms of indemnifying the state where there are no available resources.

The Constitutional Court has had occasion to consider the meaning and content of section 27, but refrained from defining a minimum core to the right, which would entail setting an objective minimum standard against which the state's compliance with the duty can be measured.[72] There are various reasons why the Constitutional Court has refrained from detailing the minimum core of the section 27 right, including judicial respect for the legislature and the executive, and an inability to define the exact content of what each right entails, given the vast needs of the different rights-holders.[73] Though the court has refrained from defining the content of the right, it has commented on the reasonableness of state policies.[74] Further, where the state has itself defined the content of the right, the courts have

[70] S 27(2); H Thompson (note 11 above) 147. S 27 is therefore said to impose both negative and positive obligations on the state – see S Liebenberg *Socio-economic Rights: Adjudication Under a Transformative Constitution* (2010) 57.

[71] *Soobramoney v Minister of Health, KwaZulu-Natal* 1997 (12) BCLR 1696 (CC) para 11. I Currie and J de Waal (note 22 above) 581 – 584. On the political history surrounding the inclusion of socio-economic rights and their limitations, see S Liebenberg (note 70 above) 7 – 14.

[72] The court aquo had held that it did not agree that the Constitutional Court had rejected the adoption of a minimum core. Instead, the High Court held that this could only be done in the correct circumstances where sufficient information was available. See *Mazibuko and others v City of Johannesburg and others (Centre on Housing Rights and Evictions as amicus curiae)* [2008] 4 All SA 471 (W) [hereinafter '*Mazibuko (W)*'] para 125 – 143. The Constitutional Court has declined to comment on the minimum core of all socio-economic rights as and when the circumstances have given them the opportunity to do so. See *Mazibuko and Others v City of Johannesburg* 2010 (3) BCLR 239 (CC) [hereinafter *Mazibuko (CC)*] para 48 - 68, *Minister of Health and Others v Treatment Action Campaign and Others (1)* 2002 (10) BCLR 1033 (CC) para 34, *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC) (hereinafter 'Grootboom') para 32; I Currie and J de Waal (note 22 above) 591; H Thompson (note 11 above) 150 – 151. See also *Manqele v Durban Transitional Metropolitan Council* 2002 (6) SA 423 (D) 427. However, see D Bilchitz *Poverty and Fundamental Rights* (2007) 141 – 149 and S Liebenberg (note 70 above) 148 – 151 who criticise the court's decision to avoid defining a minimum content to socio-economic rights. I T Winkler *The Human Right to Water* (2012) 250; T Humby and M Grandbois 'Human right to water in South Africa and the *Mazibuko* decisions' (2010) 51 *Les Cahiers de Droit* 536.

[73] S Liebenberg (note 70 above) 149 – 151, discussing the reasons that militate against the minimum core as discussed by the Court in the *Grootboom* and *Treatment Action Campaign* cases.

[74] I Currie and J de Waal (note 22 above) 592; S Liebenberg (note 70 above) 151.

been willing to engage with whether or not the state's actions fall short of what is reasonable as measured against their own definition.[75]

In the most controversial constitutional decision to evaluate the right of access to water as contained in section 27, namely *Mazibuko v City of Johannesburg*,[76] the Constitutional Court was first required to evaluate whether the provision of six kilolitres of water, as prescribed by the Free Basic Water Policy and the Water Services Act, was consistent with the requirements of section 27 of the Constitution.[77] Secondly, the court had to consider the lawfulness of the state's actions to regulate water use.[78]

The residents of a poverty-stricken settlement in Johannesburg brought the action after the state, in an attempt to reduce water loss and non-payment for water services, implemented more stringent water provisions.[79] In terms of this initiative, residents of the area could choose between the installation of a prepaid meter or a yard tap with restricted water flow.[80] These particular residents had a pre-paid metering system installed which resulted in water services being shut off when the meter ran out of credit.[81]

The implementation of this policy was challenged on the basis that it infringed the constitutional right of access to water.[82] Each of the systems dispensed six kilolitres of free water per month, in accordance with the allocated amount as set

[75] I Currie and J de Waal (note 22 above) 579.

[76] 2010 (4) SA 1 (CC).

[77] Para 6; See also S Liebenberg (note 70 above) 466. The constitutional provision was also considered by the High Court in *Manqele v Durban Transitional Metropolitan Council* 2002 (6) SA 423 (D), *Residents of Bon Vista Mansions v Southern Metropolitan Local Council* 2002 (6) BCLR 625 (W) and *Highveldridge Residents' Concerned Party v Highveldridge TLC and Others* [2002] JOL 9733 (T). See in this regard J Glazewski (note 10 above) 16-7 – 16-9; A Gowlland-Gualtieri 'South Africa's water law and policy framework: Implications for the right to water' (2007) 3 *International Environmental Law Research Centre* 11.

[78] Para 6.

[79] Para 4 and 12 – 18.

[80] Para 14 – 17.

[81] Mrs Mazibuko alleged that she had not consented to the installation of a pre-paid meter, nor was she informed of the option to install a yard tap as an alternative. See para 16 of the judgment.

[82] Para 6.

by the state.[83] The applicants sought an order from the court declaring that the provision of six kilolitres per household in accordance with the state's Free Basic Water Policy was insufficient under the circumstances.[84] They further requested that the court declare that the amount of free water provided to each household should be increased to 50 kilolitres.[85]

As will be discussed below, the standard of evaluation of a state policy in the context of socio-economic rights is whether the policy positively and progressively furthers the right, against an assessment of reasonableness under the circumstances.[86] The court had to investigate whether the policy implemented by Johannesburg Water progressively furthered the satisfaction of section 27(1)(b) of the Constitution, and further whether the implementation of this policy was reasonable under the circumstances.

The Court undertook an enquiry into the relationship between section 27(1)(b), which requires that everyone has the right of access to sufficient water, and section 27(2), which stipulates that 'the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of these rights'. The court, on the basis of its own jurisprudence, held that section 27(2) limits the scope of section 27(1)(b) and the constitutional right does not therefore create a duty on the state to provide unlimited access to water to all immediately.[87] Instead, it creates an obligation on the state to continue to adapt its policies and programmes to ensure the progressive realisation of the right.[88] Further, the court held that it would be inappropriate to fix a minimum standard as this would vitiate the benefits of an enquiry based on

[83] S 9 of the Water Services Act read with reg 3(b) of GNR.509 of 8 June 2001: Regulations Relating to Compulsory National Standards and Measures to Conserve Water. See also para 22 – 23.

[84] Para 44.

[85] Para 44.

[86] Para 40.

[87] Para 49 – 50. *Grootboom* para 39.

[88] Para 56 – 59.

reasonableness.[89] If a fixed standard was implemented by the courts, it would eliminate the flexibility afforded to the judicial forum to evaluate the reasonableness of state conduct depending on the circumstances of the matter.[90]

In the second instance, the court argued that it would be inappropriate for it to comment on the exact nature of the policies that should be implemented to attain the fulfillment of this right, as this was a task better suited to the legislature and the executive.[91] The court consequently adopted a deferential approach by pointing out that the legislature and the executive, as democratically appointed bodies with the necessary institutional resources, were best placed to evaluate the needs of the public.[92] The court was of the view that the City had made out a case that highlighted the intricacies and difficulties of providing free water services to a variety of different water users.[93]

One of the arguments put forward by the applicants was that the City's policy was inflexible and could not cater for the provision of water services to households with more occupants on an equitable basis.[94] The court, after an investigation of the evidence, stated that though the policy that was introduced in 2001 seemed inflexible, the actions of the municipality over the years showed that they continuously revised the policy in an attempt to provide an additional allocation of water to indigent households.[95] Under the circumstances, therefore, the state had acted progressively and had shown an intention to realise the right.[96] The

[89] Para 60.

[90] Para 60. However, see S Liebenberg (note 70 above) 180, who argues that a normative standard should be set by the court taking into account the values and purposes of the provision. She further argues that this inquiry should not amount to a final definition of the right, and that the 'normative content of socio-economic rights should always remain contingent and incomplete, allowing space for the evolution of new meanings in response to changing contexts and forms of injustice'.

[91] Para 61; See also *Manqele v Durban Transitional Metropolitan Council* 2002 (6) SA 423 (D) para 427C – 427G where the courts refused to provide a minimum content to the right of access to water, prior to the implementation of the Free Basic Water Policy.

[92] I Currie and J de Waal (note 22 above) 579; T Humby and M Grandbois (note 72 above) 536.

[93] Para 102; M Muller 'Free basic water – a sustainable instrument for a sustainable future' (2008) 20 *Environment and Urbanization* 67–87.

[94] Para 90 – 97.

[95] Para 96.

[96] Para 97.

abovementioned factors resulted in a finding that the Free Basic Water policy and its implementation were not unreasonable under the circumstances.[97]

Liebenberg argues that the court incorrectly dealt with the assertions of the applicants in terms of the jurisprudence of the court relating to minimum core arguments. According to Liebenberg, by dealing with the right of access to water as set out in section 27(1)(b) in terms of the reasonableness enquiry, established in terms of section 27(2), the court fails to evaluate the obligations set out in section 27(1)(b) as a self-standing clause.[98] She further argues that the court should have substantively evaluated whether the amount of water provided was sufficient to meet the daily needs of the community, such that their dignity was not infringed. The 'impact' of the restriction 'on their life, health and dignity' had to be considered in addition to whether the City had the resources to make more water available.[99] The earlier decision of the court a quo shows a far greater appreciation of the concept of dignity by stating the following:[100]

> To deny the applicants the right to water is to deny them the right to lead a dignified human existence, to live a South African dream: to live in a democratic, open, caring, responsive and equal society that affirms the values of human dignity, equality and freedom. The denial would perpetuate the decades-long poverty, deprivation, want and undignified existence of the recent past. The Bill of Rights guaranteed in the Constitution would, as a result of the denial, remain a distant mirage of unfulfilled dreams. The denial is unconstitutional and therefore unlawful.

The decisions of the High Court and the Supreme Court of Appeal (the 'SCA')[101] favour the applicants' case and show that dignity played a central role in this enquiry, recognising that without giving effect to the right of access to water, other rights in the Bill of Rights could not be fulfilled.[102] The SCA, in particular, was mindful that the responsibilities of the state are limited by its available

[97] Para 78 – 102.

[98] S Liebenberg (note 70 above) 467.

[99] S Liebenberg (note 70 above) 468.

[100] *Mazibuko (W)* para 160.

[101] The Supreme Court of Appeal is South Africa's apex court in all non-constitutional matters.

[102] *City of Johannesburg and others v Mazibuko and others (Centre on Housing and Evictions as amicus curiae)* [2009] 3 All SA 202 (SCA) [hereinafter *'Mazibuko (SCA)'*] para 17. See also S Liebenberg (note 70 above) 181.

resources.[103] However, as the court pointed out, the City had not argued that it had insufficient resources to provide more water to the residents of Phiri.[104] Rather, the City argued that it had no obligation to provide free water to these residents.[105] In order to make the reasonableness enquiry meaningful, Liebenberg argues that the court must give content to the 'normative standards underpinning socio-economic rights'.[106] Without doing this, she argues that the 'criteria of reasonable review amount to little more than a list of 'good governance' standards for the State as opposed to fundamental human rights analysis'.[107]

Section 27 creates a duty that is placed on the state to take positive steps to create reasonable legislative and other measures to attain the fulfillment of these constitutional rights.[108] This aspect of the right requires the state to take positive steps to ensure compliance with section 27.[109] Within the context of the duty, two types of state conduct can be distinguished: positive state conduct which 'deprives people of their existing access to socio-economic rights', which is assessed in terms of the general limitations clause; and state conduct which allegedly fails to progressively realise the right, which is assessed in terms of section 27(2) and may be justifiable on the basis of resource constraints.[110] Whilst section 24 does not require the state to realise the right progressively, it requires the state to implement reasonable legislative and other measures to achieve this right. Consequently, the test set out for establishing whether the state is achieving its obligations in terms of section 27 is equally applicable to section 24, insofar as it

[103] Para 26; The SCA ordered that the City was required to 'reformulate and adopt a water policy that was reasonable, based on the court's interpretation of s 27(1)(b) [para 46]. See T Humby and M Grandbois (note 72 above) 535

[104] Para 27.

[105] Para 27; T Humby and M Grandbois (note 72 above) 531.

[106] S Liebenberg (note 70 above) 469.

[107] S Liebenberg (note 70 above) 180.

[108] S 24(b); H Thompson (note 11 above) 137.

[109] *HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2006 (5) SA 512 (T) para 16*;* M Kidd (note 8 above) 22; I Currie and J de Waal (note 22 above) 522.

[110] However, see Ch 5 (note 178 below) for a discussion of the effect of poverty on the vulnerable. See also S Liebenberg (note 70 above) 218, who discusses the nuances of the judgment in *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 (2) SA 140 (CC), 2005 (1) BCLR 78 (CC) in this respect.

questions the conduct of the state's measures. The locus classicus of the interpretation of this provision is found in the judgment of *Government of the Republic of South Africa v Grootboom*.[111]

In *MEC for Agriculture, Conservation, Environment and Land Affairs v Sasol Oil (Pty) Ltd and Another*[112] the court held that section 24(b) imposed a positive obligation on the state to ensure compliance with the right to a healthy environment through the implementation of reasonable legislative and other measures.[113] This is in accordance with *Government of the Republic of South Africa v Grootboom*, which held that the constitutional directive requires that it is not sufficient simply to introduce legislation to satisfy the right.[114] The right goes further by requiring that the state must also introduce *reasonable* policies and programs, appropriate to the circumstances.[115] In addition, these policies and programs must be *reasonably* implemented by the state.[116] Finally, the court held that these policies must be both 'balanced and flexible'.[117]

With reference to the nature of the language used in the Constitution, specifically in the context of socio-economic rights, the court in *Grootboom* held that the state would not meet its constitutional obligations by simply enacting legislation.[118] The duty to take positive steps to fulfill these rights required more than this.[119] In this respect, 'the [s]tate is obliged to act to achieve the intended result, and the legislative measures will invariably have to be supported by appropriate, well-directed policies and programs implemented by the executive'.[120] These policies

[111] 2001 (1) SA 46 (CC).

[112] 2006 (5) SA 483 (SCA).

[113] Para 14; *HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2006 (5) SA 512 (T) para 16.

[114] *Grootboom* para 42; A Kok and M Langford (note 19 above) 56B-3; M Kidd (note 8 above) 23.

[115] *Grootboom* para 42; *BP* para 142. See also C Sunstein *Designing Democracy* (2001) 227 ff.

[116] *Grootboom* para 42.

[117] *Grootboom* para 43; M Kidd (note 8 above) 24.

[118] I Currie and J de Waal (note 22 above) 522.

[119] I Currie and J de Waal (note 22 above) 522; G R Backeberg (note 12 above) 2.

[120] *Grootboom* para 42.

are furthermore required to cater for, and favour, the most vulnerable in society; where they fail to take account of the vulnerable adequately or at all, these policies must be declared to be unreasonable.[121]

As a result of this decision, socio-economic rights now impose upon the state the duty to act in accordance with a standard of reasonableness. This entails not only that reasonable legislation and associated policy is created that aims to fulfill the right, but also the reasonable implementation thereof.[122] As a result, a failure to implement legislation and policies reasonably provides a legitimate ground for a court to find that the state has violated its duties.[123] An assessment of reasonableness will be evaluated by the court in light of the context of the case and each appraisal of state conduct will be undertaken on a case-by-case basis.[124] It is also a requirement that the programmes implemented by the state 'clearly allocate responsibilities and tasks to the different spheres of government and ensure that the appropriate financial and human resources are available'.[125] While the court in *Grootboom* directed the state to revise its housing policy, it did not go so far as to prescribe the content of the amended policies, evidencing judicial restraint to give effect to the separation of powers doctrine.[126]

The court is not limited to evaluating only the reasonableness of the state's adopted measures and their implementation. There is nothing, in theory, preventing the court from evaluating whether a budgetary allocation made by the

[121] *Grootboom* para 44; *Mazibuko (CC)* para 67. See R Francis 'Water justice in South Africa: Natural resources policy at the intersection of human rights, economics and political power' (2005-2006) 18 *Georgetown International Environmental Law Review* 45.

[122] I Currie and J de Waal (note 22 above) 522; H Thompson (note 11 above) 147 – 149.

[123] I Currie and J de Waal (note 22 above) 523.

[124] *Grootboom* para 92; I Currie and J de Waal (note 22 above) 575.

[125] *Grootboom* para 39; H Thompson (note 11 above) 149.

[126] Para 99. See below at Ch 7 (note 243 below). See also *Minister of Health and Others v Treatment Action Campaign and Others* (1) 2002 (10) BCLR 1033 (CC) para 135, *Doctors for Life* (note 55 above) para 37. See further D Moseneke 'Oliver Schreiner memorial lecture: Separation of powers, democratic ethos and judicial function' (2008) 24 *South African Journal on Human Rights* 348 – 350. See generally I T Winkler *The Human Right to Water* (2012) 103.

state is reasonable.[127] For example, the Constitutional Court in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd*[128] held that it was insufficient for the City to allege that it had not made provision in its budget for a necessary course of action, where it should in fact, under the circumstances have done so.[129] Consequently, where it is appropriate to do so, the court may go further than simply evaluating the actions of the state in respect of legislative measures and policies. However, as was the case in *Grootboom,* the court must be mindful not to exceed its powers and stray into the terrain of the executive and legislature.

It is clear from the Water Act and the Services Act, when read together with section 24 and 27, that the state effectively creates its own parameters by enacting the legislation and policies that will then govern its actions as trustee. However, the courts have been given the authority to hold the state accountable, by allowing them to evaluate the reasonableness of the state's legislative and other measures, and their implementation thereof. If the state were to enact legislation or policies that fell short of the requirements set out in the Constitution, the courts would be able to set these aside. While the Constitutional Court has refrained from defining the content (or minimum core) of these rights, it has established that the litmus test for whether or not the state is satisfying its duties is whether its actions are reasonable under the circumstances.[130] This approach does not unnecessarily step into the sphere of the government prerogative.[131] Instead, it maintains the delicate

[127] I Currie and J de Waal (note 22 above) 582. S Liebenberg argues that all budgetary and policy information should be placed before the court in order for them to make an assessment of whether the state has complied with its constitutional duties. See S Liebenberg (note 70 above) 186.

[128] 2012 (2) SA 104 (CC).

[129] Para 74; I Currie and J de Waal (note 22 above) 582.

[130] Some of the criteria that are used for the assessment of reasonableness include whether the programme is 'capable of facilitating the realisation of the right; comprehensive, coherent and coordinated; appropriate financial and human resources must be available for the programme; balanced and flexible; appropriate provision for short-, medium- and long-terms needs; reasonably conceived and implemented; transparent, and its contents must be made known effectively to the public; and make short-term provision for those whose needs are most urgent and who are living in intolerable conditions' – see S Liebenberg (note 70 above) 152 - 153 as discussed in I Currie and J de Waal (note 22 above) 578.

[131] I Currie and J de Waal (note 22 above) 583. See also C Sunstein (note 115 above) 221 – 222.

balance necessary for the judicial review of legislative and executive decisions, provided that the court refrains from overstepping its powers.[132]

2.3. Other Relevant Provisions Contained in the Bill of Rights

Section 24 and 27 of the Constitution, and the reasonableness of their implementation by the state, must also be considered in light of the other rights in the Bill of Rights as these are related to, and impact upon, one another.[133] As a result, the infringement of one right, such as the right to water, may result in the infringement of others, such as the right to dignity or equality.[134] In this respect there are a number of rights in the Bill of Rights that may directly and indirectly affect the operation of the bundle of rights related to water. These rights (the right to property, the rights to equality and dignity, access to justice and information, and the right to just administrative action)[135] form part of the substantive principles or goals of trusteeship, and are discussed more fully in Chapter 5. They are cursorily set out below for the sake of completeness.

As was discussed earlier in this thesis, historically the rights related to the access to water were linked to ownership of land. Despite the fact that all water is today considered to be public, the *constitutional protection of property* may still be relevant in the context of water.[136] There is a debate as to whether expropriation is possible in the context of water rights,[137] particularly where the state reduces a

[132] I Currie and J de Waal (note 22 above) 583.

[133] *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC) 44; I Currie and J de Waal (note 22 above) 578. See also L Ferris 'Environmental rights and locus standi' in A Paterson and L Kotzé (eds) *Environmental Compliance and Enforcement in South Africa* (2009) 143 – 145; S Liebenberg (note 70 above) 51 who discusses the necessity for an integrated approach to socio-economic and civil-political rights.

[134] I Currie and J de Waal (note 22 above) 578 - 579.

[135] Other rights and provisions may also be of relevance in the context of water management; R Pejan, D du Toit and H Thompson 'Norms for policy implementation lags in the South African water sector' (2011) *Report to the Water Research Commission* 2.

[136] S 25 of the Constitution.

[137] For a discussion on this point see M Kidd (note 8 above) 88 – 90. The expropriation of property for any purpose consistent with the Act is regulated by s 64 – 65. For a discussion on expropriation generally see I Currie and J de Waal (note 22 above) 547 – 553 and also H Thompson (note 11 above) 138 for a discussion on expropriation without compensation in the context of water. See

water allocation. Expropriation is expressly permitted in terms of the Water Services Act, provided that it is authorised by the written consent of the Minister and complies with the Expropriation Act.[138] However, in certain circumstances, such as a reduction in allocated water use rights, it is arguable that deprivation or expropriation in terms of section 25 has taken place. The focus of this thesis is on public, rather than private rights, and consequently this debate is not discussed.

In the context of the violation of the right of access to water, particularly where vulnerable parties are involved, *the rights to equality and dignity* are likely to be infringed. Both of these concepts are founding values in the Constitution.[139] Dignity underlies all the rights in the Constitution, both as a right, and as a value.[140] In the context of equality, the Constitutional Court has held that the Constitution employs the notion of substantive rather than formal equality.[141] This entails the notion that not every person is entitled to exactly the same rights in exactly the same shape and form.[142] Instead, substantive equality looks to the social and economic context to ascertain whether conduct is fair, and this is decided on a case-by-case basis.[143] It will be argued that the right to dignity and equality are at the heart of the values that underlie water management.[144]

The Constitution has created a right of *access to information*,[145] to which effect is given by the Promotion of Access to Information Act 2 of 2000 ('the PAIA').[146]

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also S Movik and F de Jong 'Licence to control: implications of introducing administrative water use rights in South Africa' (2011) 7/2 *Law, Environment and Development Journal* 71 – 72; G R Backeberg (note 12 above) 113; E van der Schyff 'The concept of public trusteeship as embedded in the National Water Act, 1998' (2011) *Water Research Commission* 86 – 87; L Ferris (note 10 above) 15; G J Pienaar and E van der Schyff (note 185 above) 9 - 13.

[138] S 81 Water Services Act.

[139] S 1; I Currie and J de Waal (note 22 above) 250.

[140] *S v Makwanyane*1995 (3) SA 391 (CC) 144; I Currie and J de Waal (note 22 above) 251 – 253.

[141] *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) 41; I Currie and J de Waal (note 22 above) 213 – 214.

[142] I Currie and J de Waal (note 22 above) 213; W Amien and M Paleker 'Equality' (1997 – 1998) 8 *South African Human Rights Year Book* 322.

[143] I Currie and J de Waal (note 22 above) 213 – 215; W Amien and M Paleker (note 142 above) 322.

[144] See Ch 5 (note 124 ff below).

[145] S 32.

This right allows anyone, (that is, both natural and juristic persons), to request information from the state as well as private parties when they can show cause.[147] This right is essential in the context of a democratic society as the accountability and transparency of the state cannot be achieved without the necessary information being made available or accessible to the public.[148] One of the purposes of the PAIA is to promote good governance, which is a feature necessary for the proper functioning of water management.[149] The extent to which good governance is essential for the successful management of water resources, both in terms of environmental protection and access, will be discussed in Chapter 5.

The right of *access to information* can be a powerful tool in the environmental context, as it provides parties with a legal right to request information not only from the state, but also from private parties.[150] While the Constitution does not give rise to a right to public participation, it does require participatory democracy. Public participation and access to information are complimentary rights: for citizens to participate in the affairs of the state, they must be properly informed.[151] Together, public participation and access to information promote participatory democracy, by involving the community in decision-making and ultimately, the governance of the country.[152]

In addition to the right of access to information, the Constitution provides for the right of *access to justice* and establishes a list of persons or entities that may approach the appropriate competent court when any right contained in the Constitution is breached.[153] This is not only limited to directly affected persons, but also persons or associations acting in the public interest or the interests of their

[146] Act 2 of 2000.

[147] M Kidd (note 8 above) 27.

[148] I Currie and J de Waal (note 22 above) 692.

[149] I Currie and J de Waal (note 22 above) 698 – 699.

[150] M Kidd (note 8 above) 27; I Currie and J de Waal (note 22 above) 700 – 702.

[151] I Currie and J de Waal (note 22 above) 699.

[152] I Currie and J de Waal (note 22 above) 699.

[153] S 38; M Kidd (note 8 above) 26.

members.[154] The right to *just administrative action* and its associated legislation, the Promotion of Administration of Justice Act 3 of 2000 (the 'PAJA'),[155] is also an important constitutional right in terms of the enforcement of the environmental rights.[156] The relationship between trusteeship and administrative law is discussed in Chapter 7 below.

The right of access to the courts is also essential for the functioning of a democratic society, as it affords the public a right to approach an independent and impartial forum, tribunal or court, where a justiciable dispute arises.[157] However, it is not necessarily the case that where a right is limited, there has been a constitutional infringement. The Constitution provides in section 36 that there may be legitimate circumstances for the limitation of any of the rights contained in the Bill of Rights. It must be shown that any limitation is justifiable by evaluating such limitation against the test contained in the limitations clause in section 36.[158]

In broader terms, the Constitution requires that the *spirit, purport and objects of the Bill of Rights should be promoted* by every court, tribunal or forum, in the context not only of the Constitution, but also legislation and the common law.[159] This provision is also important when one considers the objectives of modern environmental jurisprudence, as it allows the court to pronounce on the environmental compliance of any legislation or common law.[160]

A remedy based on a constitutional infringement should only be sought where the common law and legislation cannot assist. This is consistent with the principle of

[154] S 38(a).

[155] Act 3 of 2000.

[156] M Kidd (note 8 above) 27.

[157] I Currie and J de Waal (note 22 above) 711.

[158] S 36; See I Currie and J de Waal (note 22 above) 150 – 175. See also S Liebenberg (note 70 above) 199 – 203.

[159] S 39(2); M Kidd (note 8 above) 30.

[160] This has already been done where the court applied the principles of inter-generational equity in the context of the Restitution of Land Rights Act 22 of 1994, arguing that this furthered the spirit, purports and objects of the Bill of Rights. In this regard, see *In re Kranspoort Community* 2000 (2) SA 124 (LCC) 183 as discussed in M Kidd (note 8 above) 30.

avoidance: this requires that the common law and legislation should be interpreted, applied and developed consistently with the Bill of Rights, prior to any action being brought which relies solely on a constitutional provision.[161] Similarly, the principle of subsidiarity requires that 'norms of greater specificity should be applied to the resolution of disputes before resorting to norms of greater abstraction'.[162] In this context, litigants should, for example, first rely on the Water Act or the Services Act to show that a cause of action lies, before attempting to show the breach of any other legislation or constitutional right.[163] The principle of subsidiarity has another application in the context of the decentralisation of power, whereby power should be devolved to the lowest appropriate level.[164]

If any of the rights above are violated and a direct remedy is not available, a remedy can be sought from the Constitutional Court, which has the power to declare any law or conduct invalid in terms of the Constitution, or alternatively, order a declaration of rights.[165] The court also has the power to award interdictory relief, in the form of an interim, final or structural interdict.[166] Finally, the court can award damages if it finds that the damage has been caused by a violation of rights.[167]

[161] *S v Mhlungu* 1995 (3) SA 867 (CC) para 59; *Nyathi v MEC for the Department of Health, Gauteng* 2008 (5) SA 94 (CC) 149; I Currie and J de Waal (note 22 above) 25; C Hoexter *Administrative Law in South Africa* 2ed (2012) 119.

[162] *Nokotyana v Ekurhuleni Metropolitan Municipality* 2010 (4) BCLR 312 (CC) 50; I Currie and J de Waal (note 22 above) 253; E van der Schyff (note 52 above) 382.

[163] *Mazibuko (CC)* para 73 – 74.

[164] See discussion below (note 266); R Pejan and J Cogger 'The application of assignment and delegation within the context of the National Water Act: the implications for Catchment Management Agencies' (2013) 130 *SALJ* 141 – 145; H Mackay (note 16 above) 61.

[165] See I Currie and J de Waal (note 22 above) 183 – 197. See also S Liebenberg (note 70 above) 380 – 462.

[166] I Currie and J de Waal (note 22 above) 197 – 200. The structural interdict may be the most useful remedy for the promotion of the goals of a transformative Constitution. The state is afforded the discretion to respond to the court's order whilst the court ensures that it maintains a measure of oversight in terms of the state's reaction. In this regard, see S Liebenberg (note 70 above) 434 – 438.

[167] I Currie and J de Waal (note 22 above) 200 – 205.

3. Legal Mechanisms for Water Management: The Legislative Imperative

In amplification of the constitutional mandate embodied by section 24 and 27, the Water Act and the Services Act serve to give effect to these rights.[168] These Acts are meant to function holistically in order to ensure that sufficient, clean water is provided for both consumptive and sanitation purposes, and that water resources are conserved and protected in accordance with the constitutional mandate.[169] Whilst trusteeship has constitutional authority by virtue of section 24 of the Constitution,[170] it is also expressly statutorily required.[171] In this regard, the two Acts afford the state (particularly the Minister) as trustee, broad discretion to satisfy the goals of water management.[172] The Department of Water Affairs announced on 30 August 2013, through the publication of the National Water Policy Review, that it intends consolidating the National Water Act and Water Services Act, in order to govern the 'entire water value chain'.[173]

The National Environmental Management Act (the 'NEMA'), which gives effect to section 24 of the Constitution, also provides the framework for protection of the environment generally.[174] The NEMA requires that sustainable development is implemented, and further that the interests and needs of society are placed and prioritised in the context of environmental management.[175] However, it is uncertain to what extent the NEMA will find application in the context of water

[168] J Glazewski (note 3 above) 427; J Glazewski (note 10 above) 16-7; A Kok and M Langford et al (note 19 above) 56B-23; B Van Koppen, N Jha and D J Merrey 'Redressing racial inequities through water law in South Africa: Revisiting old contradictions?' (2002) *Comprehensive Assessment Reseach Paper* 9.

[169] M Kidd (note 8 above) 81; B Van Koppen, N Jha and D J Merrey (note 168 above) 10.

[170] L Ferris (note 10 above) 13.

[171] See note 55 above.

[172] H Thompson (note 11 above) 134.

[173] GN 888 of 30 August 2013: National Water Policy Review: Updated policy positions to overcome the water challenges of our developmental state to provide for improved access to water, equity and sustainability 5.

[174] M Kidd (note 8 above) 35.

[175] S 2(2) and 2(3); See further M Kidd (note 8 above) 36 – 40.

law, particularly where there is an overlap between the legislation.[176] The National Water Act and the Water Services Act should be looked to first when dealing with water issues in terms of the principle of subsidiarity.[177] The focus of this thesis is to discuss trusteeship in the context of the Water Act and the Water Act. Consequently, any secondary legislation will only be discussed where relevant to furthering the understanding of trusteeship.[178]

3.1. The National Water Act

The National Water Act (the "Water Act") was introduced after much public participation and debate, and is distinguishable from previous water management models in that it has implemented an integrated approach to water management.[179] The introduction of the Water Act heralded a new era in terms of water law, shifting the focus not only towards ensuring equitable access to water, but also the protection of this resource. The salient features of the goals of water management, as established by the National Water Resource Strategy published in accordance with the Water Act, are equity, sustainability and efficiency.[180] The values that underlie water management, as envisaged by this legal system, will be discussed in Chapter 5.

The discussion of the Water Act that follows aims to establish the structure of water management, including the powers and agencies involved, as well as the systems that must be implemented pursuant to the legislative requirements. To do so, the role of the state, as well as the different parties involved in the process of water management, is discussed. Secondly, the decentralisation of power from the

[176] L J Kotzé (note 37 above) 113.

[177] See note 162 above.

[178] For example, the Environmental Conservation Act 73 of 1989, the Mountain Catchment Areas Act 63 of 1970, the Mineral and Petroleum Resources Development Act 28 of 2002, the Promotion of Administration of Justice Act 3 of 2000, and the Promotion of Access to Information Act 2 of 2000.

[179] It was borne from a list of 26 principles, titled the Fundamental Principles and Objectives for the New Water Law in South Africa, established in accordance with the Constitution. B Van Koppen, N Jha and D J Merrey (note 168 above) 10. See also H Thompson (note 11 above) 158 – 162.

[180] Strategy (2013) 70.

state to the various agencies that are established in terms of the Act are set out. The ownership of water, the nature of the rights to water and the system of entitlements to use water are discussed. In addition, the system of the establishment of the Reserve and the classification of water sources are considered.

3.1.1. The State's Role in the Governance of Water

To achieve the constitutional mandate pertaining to water,[181] the Water Act has introduced the statutory concept of trusteeship.[182] This places the duty to manage water on the National Government.[183] Section 3 of the National Water Act states as follows:

> (1) As the public trustee of the nation's water resources the National Government, acting through the Minister, must ensure that water is protected, used, developed, conserved, managed and controlled in a sustainable and equitable manner, for the benefit of all persons and in accordance with its constitutional mandate.
>
> (2) Without limiting subsection (1), the Minister is ultimately responsible to ensure that water is allocated equitably and used beneficially in the public interest, while promoting environmental values.
>
> (3) The National Government, acting through the Minister, has the power to regulate the use, flow and control of all water in the Republic.

The Minister, therefore, is tasked with the role of representing the state as the trustee of water in the country, and hence is responsible for the management of

[181] See note 17 above.

[182] The foundations of this clause originate in the White Paper on a National Water Policy for South Africe, which expressly requires the implementation of trusteeship. The clause states specifically as follows:

> 'To make sure that the values of our democracy and our Constitution are given force in South Africa's new water law, the idea of water as a public good will be redeveloped into a doctrine of public trust which is uniquely South African and is designed to fit South Africa's specific circumstances.'

See White Paper on a National Water Policy for South Africa, 1997 and E van der Schyff (note 52 above) 380; E van der Schyff (note 137 above) 1; D Fisher *The Law and Governance of Water Resources* (2009) 243 argues that public trusteeship is a manifestation of public ownership of public things, which has as its basis public property classified as *res extra commercium* in Roman law. See below at Ch 4 (note 4 ff). A Gowlland-Gualtieri 'South Africa's water law and policy framework: Implications for the right to water' (2007) 3 *International Environmental Law Research Centre* 4.

[183] S 2 read with s 3 of the National Water Act; *Mostert Snr and another v S* [2010] 2 All SA 482 (SCA) para 10.

water as a resource.[184] This provision is administrative in nature, as it establishes the powers and responsibilities of the state in relation to the management of water resources. The Act defines the general duties that the state must fulfill, namely that trusteeship consists of the protection, use, development, conservation, management and control of water.[185] In the following discussion of water management more generally, it relies on the Act's categorisation of the duties of trusteeship, namely, the protection, use, development, conservation, management and control of water.

The Act establishes standards against which these duties are to be measured. In the first place, water management and its incumbent duties must be performed sustainably. Secondly, equity must be ensured. In addition, because all persons are the beneficiaries of this trusteeship relationship, the state must act in the beneficial interests of all persons. Finally, to satisfy the duties of trusteeship, the state must act consistently with its constitutional mandate. There are thus four requirements of trusteeship, namely, sustainability, equity, the beneficial interest of the public, and constitutionality.

Section 3(2) of the Act prescribes that, in the context of the allocation of water rights, a balance must be struck between the equitable and beneficial use of water in the public interest, and the promotion of environment values. Section 3(3) provides that the use, flow and control of water is to be regulated by the state.

Section 3 of the Act therefore establishes that at the very least trusteeship requires the protection, use, development, conservation, management and control of water (or more generally, the duties of water management) as measured against the requirements of sustainability (incorporating the recognition of environmental values), equity, in the beneficial interest of all persons, and finally, constitutionality. These aspects are more fully discussed in Chapter 5.

[184] S 3(1); E van der Schyff (note 137 above) 50.

[185] S 3(1); G J Pienaar and E van der Schyff 'The public management of water resources in South Africa' (2008) *Forum on Public Policy* 4.

National Government has the exclusive competency in relation to the management of water.[186] While the role of trustee is held by the Minister on behalf of the state, the governmental department responsible for the implementation of the Act, and the implementation of the duties of trusteeship, is the Department of Water Affairs (hereinafter referred to as the 'Department').[187] Although one department is solely responsible for water management, the new scheme requires cooperative governance between all of the relevant departments, both on a vertical and a horizontal level.[188] Vertically, this requires cooperation between national, provincial and local government, consistent with the constitutional requirement of cooperative governance.[189] Horizontally, this requires cooperation within and between governmental departments: for example, the Department of Water Affairs and the Department of Environmental Affairs are required to work together to ensure that the goals of water management are achieved.[190]

To effect a decentralisation of power as envisaged by the Act (and consistent with the principle of subsidiarity),[191] the delegation and assignment of powers by the Minister to the lowest appropriate level is necessary.[192] Subject to certain

[186] See note 24 above.

[187] The Department of Water Affairs and Forestry is listed in the Act as the responsible authority. However, it is now termed the Department of Water Affairs. For further information, see http://www.dwaf.gov.za/ [accessed on 24.7.2013]. The responsible authority is defined in the Act as follows: 'in relation to a specific power or duty in respect of water uses, means – if that power or duty has been assigned by the Minister to a catchment management agency, that catchment management agency; or if that power or duty has not been so assigned, the Minister.

[188] S 22(4) for example states that 'in the interests of cooperative governance, a responsible authority may promote arrangements with other organs of state to combine their respective licence requirements...'. B Van Koppen, N Jha and D J Merrey (note 168 above) 9.

[189] S 40 and 41 of the Constitution expressly require the principles of cooperative governance be implemented. A number of principles guide the implementation of cooperative governance, including s 41(c), which states that 'each sphere must provide effective, transparent, accountable and coherent government for the Republic as a whole'.

[190] B Van Koppen, N Jha and D J Merrey (note 168 above) 9.

[191] See note 162 above.

[192] S 238 of the Constitution authorises the delegation of powers or functions to 'any other Executive organ of state, provided the delegation is consistent with the legislation'. The preamble to the Act also states that delegation to a regional or catchment level must be undertaken where appropriate 'so as to enable everyone to participate'.

exceptions,[193] the Act expressly allows the Minister to delegate the power vested in her to a named official or a particular office within the Department, a water management institution,[194] an advisory committee or a water board.[195] The Director-General is also authorised to delegate powers to an official of a Department (by name), the holder of an office in a Department or a water management institution.[196] Similarly, catchment management agencies can delegate their powers and duties to members of their governing bodies, an employee (in name) or holder of an office in a water management institution, or to a committee established by the agency.[197] This is consistent with the constitutional entitlement afforded to an organ of state, which allows delegation, to the extent that it complies with the requirements of the legislation.[198]

However, the nature of the duties capable of delegation and assignment is unclear. Pejan and Cogger argue that the lack of clarity in the Act as to the exact nature of the duties that are either assigned or delegated is hampering the efficient establishment of catchment management agencies.[199] The Water Act does not clearly distinguish between delegation and assignment, and also fails adequately to define the nature and extent of the powers that are to be afforded to a catchment management agency.[200] As will be discussed below, while the intention of the

[193] For example, the power to make a regulation, authorise an expropriation and appoint a member of the governing board or Water Tribunal may not be delegated. See s 63(2)(a)-(d).

[194] S 159 of the Act details the effect of delegation. S 1 of the Act defines a water management institution as a 'catchment management agency, a water user association, a body responsible for international water management or any person who fulfils the functions of a water management institution in terms of this Act'. Where catchment management agencies are concerned, sched 3 of the Act sets out the nature of the powers and duties that may be assigned or delegated to the agency.

[195] S 63(1)(a)-(e). See generally C Hoexter (note 161 above) 261 - 276.

[196] S 75.

[197] S 86; The catchment management agency may not delegate the power of delegation or the power to make water use charges.

[198] S 238 of the Constitution; C Hoexter (note 161 above) 262.

[199] S 1 of the Act specifically states that a 'responsible authority' in terms of the Act is either the Minister or someone who has been assigned the powers and duties of the Minister, clearly evidencing that the Act contemplates the assignment of powers; R Pejan and J Cogger (note 164 above) 127.

[200] For example, the Act only sets out the effect of delegation in s 159 and omits to define the effect of assignment; R Pejan and J Cogger (note 164 above) 127.

legislation is to further the goals of decentralised government by establishing authorised, functioning catchment management agencies, the state has to a large extent failed to set up these institutions.[201]

Delegation of powers entails that the ultimate control and responsibility remains with the party who is delegating the powers to another, and there is thus never a full severing of the powers and responsibilities from the primary source of authority.[202] The Act specifically states that where delegation takes place, the powers being exercised 'must be regarded as having been exercised or performed by the person making the delegation'.[203] The ability to delegate a power includes a delegation of the responsibilities that are imposed on the Minister, which includes the duties of trusteeship.[204] As a result, any action that amounts to the utilisation of the Minister's power in accordance with the Act will attract the duties of trusteeship and the Minister will still be ultimately liable for the decision.

Assignment, on the other hand, requires the final, irrevocable transfer of all powers to another person.[205] Pejan and Cogger argue that in order for a true decentralisation of power to take place, as is envisioned by the Act, the Minister must assign rather than delegate his or her powers to a catchment management agency. The fact that the Act makes this entire process discretionary means that the Minister can retain too much power, thereby thwarting the purposes of decentralisation.[206] However, given the nature of assignment, the question that arises is whether the duties of trusteeship, as vested in the Minister, are then conveyed to parties with assigned duties.

[201] See note 278 below.

[202] R Pejan and J Cogger (note 164 above) 139.

[203] S 159. See also *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2011 (4) SA 113 (CC) 44 – 45; *Executive Council, Western Cape Legislature, and Others v President of the Republic of South Africa and Others* 1995 (4) SA 877 (CC) 173; R Pejan and J Cogger (note 164 above) 139.

[204] C Hoexter (note 161 above) 267 – 268.

[205] R Pejan and J Cogger (note 164 above) 130.

[206] R Pejan and J Cogger (note 164 above) 131.

Due to the fact that the Act specifically vests the duties of trusteeship in the Minister, who is authorised to act on behalf of the state, when it comes to the assignment of duties, it is arguable that this severs the tie of responsibility of water management back to the Minister. As a result, while the party with the assigned powers will still need to act in accordance with the purposes of the Act, as established in section 2, they cannot be considered to be a trustee of water. It is also uncertain whether the Minister can still be held liable as trustee for these duties once they have been assigned. All water management is intended to be under the control of the various Catchment Management Agencies, with the state providing a supporting, regulatory role.[207] Consequently, while the Minister will be required to facilitate the duties of trusteeship, the agencies who have been assigned powers may not be required to do the same. This surely could not have been the intention of the legislature.

While Catchment Management Agencies with assigned powers and duties may not necessarily fall within the scope of section 3 of the Act, they will still be bound by section 2 thereof.[208]

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[207] B Van Koppen, N Jha and D J Merrey (note 168 above) 14. See note 276 below.

[208] S 2 of the Act states as follows:

> The purpose of this Act is to ensure that the nation's water resources are protected, used, developed, conserved, managed and controlled in ways which take into account amongst other factors—
>
> (*a*) meeting the basic human needs of present and future generations;
>
> (*b*) promoting equitable access to water;
>
> (*c*) redressing the results of past racial and gender discrimination;
>
> (*d*) promoting the efficient, sustainable and beneficial use of water in the public interest;
>
> (*e*) facilitating social and economic development;
>
> (*f*) providing for growing demand for water use;
>
> (*g*) protecting aquatic and associated ecosystems and their biological diversity;
>
> (*h*) reducing and preventing pollution and degradation of water resources;
>
> (*i*) meeting international obligations;
>
> (*j*) promoting dam safety;
>
> (*k*) managing floods and droughts,
>
> and for achieving this purpose, to establish suitable institutions and to ensure that they have appropriate community, racial and gender representation.

In terms of the substantive guiding principles of trusteeship, the Constitution and the Water Act require that the duties of trusteeship must be satisfied in a manner that is sustainable, equitable, constitutional and beneficially furthers the public interest. The *Purpose clause* of the National Water Act does not specify that the management of water (that is, the protection, use, development, conservation, management and control of water) is limited only to National Government as trustee. Further, it requires that the management of water must take into account the factors of sustainability, equity, and the beneficial use of water in the public interest. While the *Purpose clause* does not expressly require that the considerations that must be taken into account should further the constitutional mandate of the state, any institution exercising these functions will necessarily be bound by any and all constitutional mandates, given the supremacy of the Constitution.[209] Consequently, where the duties of trusteeship are assigned to a Catchment Management Agency, the agency will still be required to perform its duties in terms of the *Purpose clause*, which requires no less than that which is required in the *Trusteeship clause* in the Act.[210]

3.1.2. The Ownership and Use of Water

This section deals with the duties of trusteeship pertinent to the use and control of water resources. Water can no longer be owned[211] and the riparian system has been abolished, thereby doing away with the distinction between public and private water.[212] Instead, all water is classified as public in an effort to realise the right of access to water for drinking and sanitation for all - a classification which is more appropriate to the modern appreciation of the value and importance of

[209] See discussion above at note 28.

[210] See also E van der Schyff (note 52 above) 381; E van der Schyff (note 137 above) 62.

[211] *Mostert Snr and another v S* [2010] 2 All SA 482 (SCA) para 23.

[212] Principles 3 and 4 of the Water Law Principles; *Mostert Snr and another v S* [2010] 2 All SA 482 (SCA) para 10; H Mackay (note 16 above) 52; G J Pienaar and E van der Schyff 'The reform of water rights in South Africa' (2007) 3/2 *Law, Environment and Development Journal* 1; C de Coning 'Overview of the water policy process in South Africa' (2006) 8 *Water Policy* 510; J Glazewski (note 3 above) 431; G R Backeberg (note 12 above) 113; E van der Schyff (note 137 above) 5.

water to society.[213] The decision to abolish the distinction between public and private water is particularly important in light of South Africa's history, where access and use of water were necessitated by land ownership.[214] Consequently, the link between access to water and poverty has been exacerbated by previous regimes that facilitated ownership of water.[215]

Furthermore, all persons are the designated beneficiaries of the trusteeship provision.[216] It is argued that the interpretation of this provision will follow that of the Constitutional Court's interpretation of section 24: the right is not limited to citizens of South Africa, and consequently, anyone within the borders of South Africa is considered a beneficiary of the water management regime.[217]

The fact that water use is now regulated and rights are awarded by the state results in a 'state-user' relationship. This is different from the riparian regime which was in place previously, in terms of which different water users were required to regulate themselves in terms of reasonableness, resulting in a 'user-user' relationship.[218] Research shows that this shift has, in some circumstances, had the unintended consequence of increasing the quantity of water stolen.[219] Where reasonableness of water use guided water users before, any additional water taken from a source effectively amounted to theft from a neighbour's water supply. However, the alleged rationale behind the state-user system and the supposed thinking of water users in terms of this system is that all water is in a common

[213] B Van Koppen, N Jha and D J Merrey (note 168 above) 11. Prior to the introduction of the National Water Act, academics called for this distinction to be abolished arguing that it was the only way to truly achieve equitable access to the resource – see R Lyster and P Lazarus 'The problem with ground water in South African law' (1995) 112 *South African Law Journal* 442.

[214] See discussion above at note 165.

[215] See also S Liebenberg (note 70 above) 218 and 304 below; E van der Schyff and G Viljoen 'Water and the public trust doctrine – a South African perspective' (2008) 4 *TD: The Journal for Transdisciplinary Research in Southern Africa* 339 – 340.

[216] E van der Schyff (note 137 above) 54.

[217] See the discussion above at note 36.

[218] Note that public water was managed by the state – see *Mostert Snr and another v S* [2010] 2 All SA 482 (SCA) para 23.

[219] See S Movik and F de Jong (note 137 above) 72 fn 22.

pool, and taking more water than is allowed is theft from the state rather than theft from a neighbour – the former being less of a moral 'sin' than the latter.[220]

There are three instances in which a license is not required for use of water in terms of the Act.[221] The first instance includes *de minimus* uses, that is, any use of water that would have little to no effect on the water source, as per the definition in Schedule 1 of the Act.[222] These include reasonable domestic use, recreational use and release of water or waste to an authorised person or body, subject to their permission (for example, run-off water into storm water drains).[223] The second instance pertains to the continuation of a pre-existing lawful use, provided that this lawful use existed two years prior to the Act coming into effect.[224] This use will continue to be lawful until such time that the Act requires permission to be sought.[225] The final exemption is when the relevant authority issues a general authorisation for a water source or geographical area.[226] In all other instances of water use, a license is required, which must be issued by the relevant authority.[227]

In the event that an activity falls outside the abovementioned permissible uses, an application for a water use license must be made to the Department.[228] The Department has the authority to allocate water use licences in specified

[220] S Movik and F de Jong (note 137 above) 72.

[221] S 22(1)(a). Water use per s 21 includes the following: taking and storing water; impeding or diverting the flow of water; engaging in a stream flow reduction activity (as set out in s 36); engaging in a controlled activity (in terms of s 37(1) and 38(1)); the discharge of waste; the altering of a watercourse; use of underground water; the use of water for recreational purposes; M Kidd (note 8 above) 78. See also J Glazewski (note 3 above) 435 – 436.

[222] S 4 read with sched 1; S Movik and F de Jong (note 137 above) 71; H Mackay (note 16 above) 56.

[223] Sched 1; M Kidd (note 8 above) 78.

[224] S 32 - 35; M Kidd (note 8 above) 78; G R Backeberg (note 12 above) 113.

[225] S 34; M Kidd (note 8 above) 78.

[226] S 39; M Kidd (note 8 above) 78; H Mackay (note 16 above) 57.

[227] See s 24, 27 - 31, 40 - 55 of the Act. It is a requirement that water uses are registered in accordance with GNR. 1352 of 12 November 1999: Regulations requiring that a water use be registered.

[228] S 22(1)(b) read with s 27 and 28; S 40 and 41. S 28 sets out the information that must be stated on the licence. This includes the person upon whom the water use is bestowed; the nature of the water use that will be issued; the property or area where the water use will take place; the conditions restricting the water use; and the licence and review periods; M Kidd (note 8 above) 87.

circumstances, and water must be allocated in accordance with the principles of equity, efficiency and sustainability.[229] The list of water uses that require authorisation has increased dramatically from what was initially defined as 'abstraction of water for offstream purposes' at the introduction of the National Water Act, to eleven categories of water use under section 21 the Act.[230]

This authorisation can either take the form of a licence or a general authorisation.[231] However, substantive considerations must be evaluated before they are awarded.[232] For example, prior to the award of a license or general authorisation for water use, the responsible authority must take into account the relevant catchment Strategy.[233] The Strategy also requires that the conditions for the award of water authorisations should be informed and guided by the goals of water protection.[234] More particularly, applicants must show how they intend to satisfy the goals of water conservation and water protection.[235] To further these goals the Strategy aims to create a system of compulsory licensing in the context of stressed catchment areas.[236] The Court has confirmed that section 24 of the

[229] Strategy (2013) 70; B Van Koppen, N Jha and D J Merrey (note 168 above) 11; S Movik and F de Jong (note 137 above) 71.

[230] These include '(a) taking water from a water resource; (*b*) storing water;(*c*) impeding or diverting the flow of water in a watercourse; (*d*) engaging in a stream flow reduction activity contemplated in s 36; (*e*) engaging in a controlled activity identified as such in s 37 (1) or declared under s 38 (1); (*f*) discharging waste or water containing waste into a water resource through a pipe, canal, sewer, sea outfall or other conduit; (*g*) disposing of waste in a manner which may detrimentally impact on a water resource; (*h*) disposing in any manner of water which contains waste from, or which has been heated in, any industrial or power generation process; (*i*) altering the bed, banks, course or characteristics of a watercourse; (*j*) removing, discharging or disposing of water found underground if it is necessary for the efficient continuation of an activity or for the safety of people; and (*k*) using water for recreational purposes; H Mackay (note 16 above) 24.

[231] S 39; On 6 September 2013, a number of new general authorisations were issued by the minister. See GN 665 of 6 September 2013: Revision of general authorisations in terms of section 39 of the Act.

[232] See discussion above (note 58).

[233] S 27(e).

[234] Strategy (2013) 43.

[235] Strategy (2013) 56.

[236] Strategy (2013) 73. However, some argue that water use licences are already poorly implemented and do not contribute to the goals of water management. See, for example, T Taylor 'Water use licences are just "word salads"' *The Citizen* 5 September 2013; D D Tewari 'A detailed analysis of evolution of water rights in South Africa' (2005) *Water World IWHA* 107.

Constitution requires the state to consider environmental, social, cultural and economic factors when awarding licences.[237]

The award of a license may not be for a period of more than forty years, and the license itself must be reviewed by the competent authority every five years.[238] In addition to the responsible authority being capable of restricting, suspending and terminating a license, it can also extend the license period upon consideration of the relevant factors.[239] The responsible authority is also entitled to make the license conditional, and can include restrictions pertaining to, *inter alia*, the protection of water, the return flow, discharge and disposal of water, and the way in which a controlled activity should be managed.[240] The license can also prescribe the quantity of water permitted to be used, and when and how it can be abstracted and stored, and further, to what extent the water must be treated or rehabilitated prior to its return to the water cycle.[241]

The provision of a license in this instance results in a personal right, rather than a real right, vesting in the applicant. Where the applicant is a land owner,[242] the licence is awarded to a specific applicant and is not necessarily transferable to successors in title.[243] The Act does make provision for the transfer of rights in certain circumstances, but this is still subject to approval by the relevant authority.[244] The National Water Policy Review aims to introduce a 'use-it or lose-it' scheme, whereby persons who do not make use of an existing lawful use of water will lose their entitlement.[245] Their rights will fall into the 'public trust'

[237] See above (note 61).

[238] S 28(1)(f) read with s 49; G R Backeberg (note 12 above) 113.

[239] S 28(2) – (6) read with s 49(2).

[240] See s 29 generally.

[241] S 29(b) - (f).

[242] J Glazewski (note 3 above) 439. However, s 60 of the Act states that a water use charge is a charge on the *land* and, while the user will not be released from their obligation, the charge may be recovered from the owner of the land.

[243] J Glazewski (note 3 above) 439 – 440.

[244] S 25 read with s 41. See also G R Backeberg (note 12 above) 113.

[245] National Water Policy Review (2013) 9; P Vecchiatto 'State mulls "use it or lose it" water rules' *Business Day Live* 4 September 2013.

and the Minister may then reallocate this water in accordance with the principles of social and economic equity.[246] This approach may, however, amount to the expropriation of water rights and the state will have to show that the 'use-it-or-lose-it' scheme does not violate section 25 of the Constitution.[247]

Once a responsible authority has made a determination as to whether a license for water use should be awarded or not, it must notify the party (as well as any party that objected to the request), and provide written reasons where requested.[248] This is a mandatory obligation, rather than a discretionary one.[249]

While the award of a license does confer on the holder thereof certain rights, it by no means creates a right to expect a certain quality or quantity of water. The Minister may determine the quantity of water available for the purposes of water allocation *generally* (in respect of general authorisations and licences).[250] The responsible authority in each management area is bound to comply with this determination.[251] However, the Act expressly states that the award of a license to a party does not ensure that the quality and quantity of the water is guaranteed.[252]

While the state cannot be compelled to provide a certain quantity and quality of water to holders of licences, the state can compel these holders to ensure that they meet the conditions of their water use. The Minister may appoint persons to perform routine inspections in respect of water use authorisations.[253] An

[246] National Water Policy Review (2013) 9; P Vecchiatto (note 245 above).

[247] Expropriation is permissible in terms of s 25(2) of the Constitution as well as the Expropriation Act 63 of 1975. A taking of property will be classified as an expropriation where the rights to property are removed 'for "public purposes"; and against payment of compensation'. See further P J Badenhorst, J Pienaar and H Mostert *Silberberg and Schoeman's The Law of Property* 5ed (2006) Ch 21.

[248] S 42(a) and (b).

[249] S 42.

[250] S 23(1).

[251] S 23(4) and (5).

[252] S 31.

[253] S 124.

appointed person may, in terms of the Act, enter any property to perform such an inspection, without prior notice.[254]

One of the most important ways in which the state has control over the licensing system, and water resources in general, is that the state continues to have the discretion to amend, suspend and revoke licences, even after they have been awarded.[255] A responsible authority may amend the conditions of a licence, although this may only be done during the time period stipulated by the licence.[256] To amend a licence, the responsible authority must undertake a general review process and may only amend the conditions of a licence for the following reasons: if it is deemed necessary in the context of the available water quantity; if it is necessary to prevent initial or further deterioration of the water quality; or if any other change in the socioeconomic conditions necessitates the amendment and it would be in the public interest to do so.[257] Any amendments must be effected equitably and all other licences for the same water use must also be amended.[258] This flexibility in the decision-making process is both desirable and necessary for the purposes of effective management of water as a resource. This is discussed in more detail in Chapter 6 below.

One of the administrative controls available to the state to hold persons liable is in the form of a directive. Where a person contravenes the Act, a directive of the responsible authority or a condition of a licence, the responsible authority may issue a directive ordering the party to remedy the contravention.[259] Failure to remedy any contravention within the stipulated time period entitles the responsible authority to take any action it deems necessary itself, recover its

[254] S 125(1). However, see below at Ch 8 (note 87) on the discussion of Environmental Management Inspectorate as created by the NEMA which grants wide powers to Inspectors to enforce environmental compliance. Unfortunately, these powers are not granted within the context of water.

[255] S 49 and 54.

[256] S 49(1). S 52 of the Act allows a licence to be amended or reviewed prior to the expiration of the stipulated time period, but only where the licencee applies to the responsible authority for such review or amendment.

[257] S 49(2).

[258] S 49(3).

[259] S 53(1).

reasonable costs, and apply to a competent court for relief.[260] Directives are a useful tool to ensure compliance with the legal framework, whilst being cheaper and less severe than prosecution.[261] Winstanley argues that, though the Act is silent on the procedural requirements for the issuing of a directive, the ordinary PAJA requirements will be applicable as well as the requirements of cooperative governance.[262]

In addition to the powers to take active steps to remedy any contravention, the responsible authority may also suspend or withdraw a licence.[263] This power extends to instances where parties have failed to pay any charge in terms of the Act.[264] Suspension or withdrawal of a licence is only permissible after the party in question has been issued with a directive by the responsible authority, and has failed satisfactorily to take the necessary steps within the stipulated time period.[265]

3.1.3. Delineation of Power to Catchment Management Agencies

The previous section set out the nature of the rights and relationship between the state and water users. In addition, it set out how the control and use of water was to be administered in terms of the licensing process. The authority to award licences to use water is derived from the Act and is accordingly one of the duties of the state as trustee. While the process of administering rights to water is performed through a licensing system, the National Water Act creates different institutions to administer the task of allocating water use rights, as well as performing the other duties of trusteeship. The purpose of this section is to discuss the various institutions that aim to promote a decentralised government, by delineating power to the lowest, appropriate level. This is in accordance with the

[260] S 53(2).

[261] T Winstanley 'Administrative measures' in A Paterson and L Kotzé (eds) *Environmental Compliance and Enforcement in South Africa* (2009) 226.

[262] T Winstanley (note 261 above) 230 – 231.

[263] S 54.

[264] S 54(1)(c).

[265] S 54(3).

Act and the Strategy's goals to implement Integrated Water Resource Management.[266]

The management of water according to administrative and political boundaries, particularly those established under Apartheid, has been reformed.[267] Water is instead managed according to the boundaries of jurisdiction of the Water Management Agencies, which have been demarcated more naturally and according to the hydrological cycle.[268] Catchment Management Agencies (or 'agencies') are created as independent legal bodies to manage these areas and are run by a representative governing body.[269]

The Strategy highlights the importance of understanding the ecological mechanisms in these catchment management areas for the purposes of protecting water resources.[270] Water management can only be dealt with as a national issue as the provincial and local legislatures do not have the competencies to deal with it in terms of Schedule 4 and 5 of the Constitution.[271] There is thus no need for water areas to be demarcated according to provincial boundaries, which in turn allows water to be managed more synergistically with natural boundaries.

A *catchment area* is defined in the Act as 'the area from which any rainfall will drain into the watercourse, watercourses or part of a watercourse, through surface flow to a common point or common points'.[272] This catchment area consists of the

[266] See below at Ch 6 (note 28).

[267] B Van Koppen, N Jha and D J Merrey (note 168 above) 10.

[268] These areas are demarcated according to GG 35517 of 27 July 2012, and before that GNR. 1160 of 1 October 1999: Establishment of water management areas and their boundaries as a component of the national water resource Strategy in terms of S 5(1) of National Water Act. M Kidd (note 8 above) 75; R Pejan and J Cogger (note 164 above) 129; B Van Koppen, N Jha and D J Merrey (note 168 above) 10; S Movik and F de Jong (note 137 above) 71; M Muller, B Hollingworth and M Ndluli 'Can we manage our water better? Prospects and processes for the establishment of stakeholder-initiated catchment management agencies' (2012) *Report to the Water Research Commission* 4 – 5.

[269] S 77, 79(2) and 82(4) read with sched 4 of the Act; R Pejan and J Cogger (note 164 above) 129. H Mackay (note 16 above) 62.

[270] Principle 6, Strategy (2013) 43.

[271] J Glazewski (note 3 above) 430.

[272] S 1.

'land, water, vegetation, structural habitats, biota, and the many physical, chemical, and biological processes that link these together'.[273] The Act requires that the National Water Resource Strategy establish the boundaries of the management area, taking into account the watercourse catchment boundaries, the social and economic development patterns, communal interests in the area, as well as efficiency considerations.[274]

The purpose of these agencies is to delineate some of the powers and responsibilities to water users.[275] The end goal of the new water management structure is to implement a decentralised model with a focus on public participation and cooperative governance. The agencies are ultimately intended to have most of the decision-making responsibilities, with the Department serving as a technical support body.[276] The approach of the state has been to establish the catchment management areas slowly, so that each new agency can learn from the mistakes of the previous pilot projects.[277] However, this slow approach has been criticised.[278] As at 2011, only three agencies were established, and none of them were fully able to authorise water uses on their own.[279] In 2013, when the Strategy was published, only two agencies were operational, namely the Inkomati and Breede-Overberg agencies in Mmpumalanga and the Western Cape respectively.[280] The decentralisation of power by providing authority to these agencies has not been facilitated by the Department, and instead, a 'top-down,

[273] J J Walmsley 'Framework for measuring sustainable development in catchment systems' (2002) 29 *Environmental Management* 198.

[274] S 6(1)(c) read with 6(2)(a) – (d).

[275] B Van Koppen, N Jha and D J Merrey (note 168 above) 2; S Movik and F de Jong (note 137 above) 71.

[276] B Van Koppen, N Jha and D J Merrey (note 168 above) 14.

[277] B Van Koppen, N Jha and D J Merrey (note 168 above) 2.

[278] R Pejan and J Cogger (note 164 above) 126; M Muller, B Hollingworth and M Ndluli (note 268 above) 2.

[279] S Movik and F de Jong (note 137 above) 68; R Pejan, D du Toit and H Thompson 'Norms for policy implementation lags in the South African water sector' (2011) *Report to the Water Research Commission* 23.

[280] Strategy (2013) 59.

cumbersome and resource-intensive system' is in place, with the National Department at the helm.[281]

Initially, nineteen water management areas were demarcated, and the relevant agencies were to be established with the goal of delineating management powers to facilitate a more participatory approach to water management.[282] To remedy the fact that these agencies are taking too long to be developed, it was announced in 2012 that only nine such agencies would be established.[283] These areas still aim to give effect to the natural hydrological features rather than political boundaries. The natural boundaries of these areas and the location of aquifers were amongst the considerations for this demarcation. Other considerations include financial considerations, the interests of stakeholders, and concerns of equity. The benefits of consolidating these regions is, according to the Strategy, to strengthen the institutional and financial resources in the areas, to speed up the establishment of catchment management agencies, and to promote cooperative governance.[284] The Strategy also aims to ensure that these agencies are created quickly and are given the necessary powers to function.[285]

The first figure below sets out the nineteen areas that were initially established in 1999.[286] The second figure shows the latest demarcation of South Africa's water sources into nine management areas.[287] The third figure shows the overlap of the old and the new system. It is apparent from these images that the water

[281] S Movik and F de Jong (note 137 above) 77.

[282] The powers and duties of the catchment management agencies are set out in sched 3 of the Act. See also M Kidd (note 8 above) 75 – 76; B Van Koppen, N Jha and D J Merrey (note 168 above) 14; S Movik and F de Jong (note 137 above) 71 and 75; G R Backeberg (note 12 above) 119. Of these 19 areas, 11 have been classified as water stressed regions, and water use allocation must be granted before an inter-basin transfer may take place.

[283] Strategy (2013) 59.

[284] Strategy (2013) 64.

[285] Strategy (2013) 59.

[286] Catchment management areas as established by GNR 1160 of 1 October 1999: Establishment of water management areas and their boundaries as a component of the national water resource Strategy in terms of s 5(1) of National Water Act.

[287] GG 35517 of 27 July 2012, namely, Limpopo, Olifants, Inkomati-Usuthu, Pongola Umzimkulu, Vaal, Roange, Mzimvubu-Tsitsikamma, Breede-Gouritz, Berg-Olifants;Strategy 64; P Saxby 'New Water Bill to ensure equitable access' *LegalBrief Policy Watch* 17 July 2013.

management areas do not follow the local and provincial boundaries. The Strategy has set the Department of Water Affairs a goal of completing the process of establishing the nine agencies by 2016.

Figure 1: Nineteen initial catchment management areas[288]

Figure 2: Revised catchment management areas[289]

[288] Image sourced from the Department of Water Affairs database. Available at http://www.dwa.gov.za/iwqs/wms/data/WMS_WMA_map.asp.

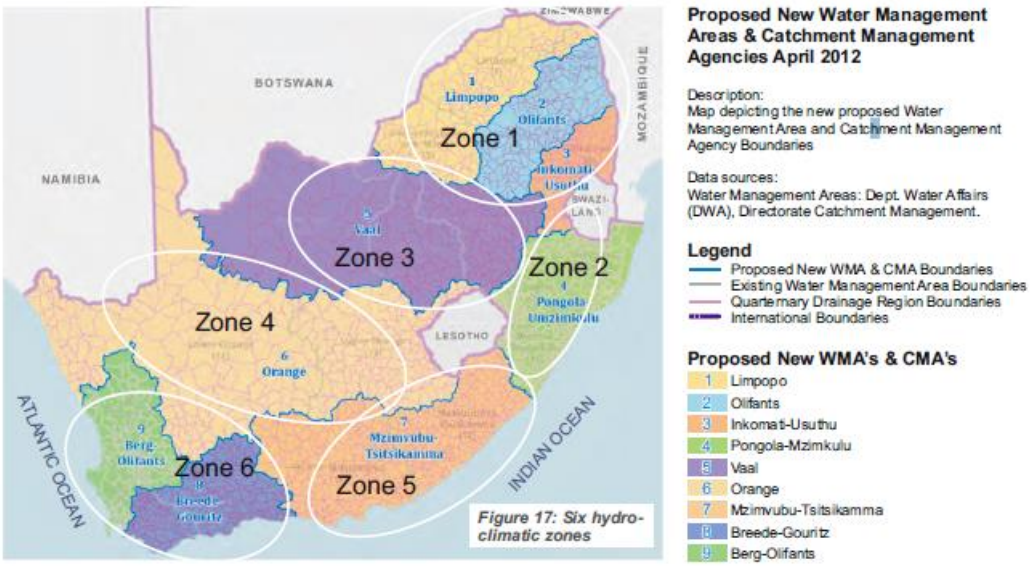

Figure 3: Overlap of old and new water management areas[290]

Some of the intended responsibilities of these agencies include the powers to authorise water uses as well as the monitoring and enforcement of water use.[291] The conservation and protection of water as well as the management of demand and water quality are also intended to be responsibility of agencies.[292] The planning of water management, the establishment of water user associations and the collection and management of information will also be delegated to agencies in due course.[293] The confusion created by the Act in terms of the delegation and assignment of powers may give rise to difficulties in this context.[294]

Where an agency has not yet been established, is not functional, or has not yet been assigned the powers and duties in question, these powers and duties vest in the Minister.[295] The Minister must assign the powers and duties to an agency after

[289] Strategy (2013) 65.

[290] Strategy (2013) 76.

[291] Strategy (2013) 65.

[292] Strategy (2013) 65.

[293] Strategy (2013) 65.

[294] R Pejan and J Cogger (note 164 above) 125. See discussion above (note 199).

[295] S 72.

considering a number of factors, including the capacity of the agency to exercise the power or duty.[296] The purpose of the assignment and delegation of powers is to promote the management of this area in accordance with the purposes of the Act. However, the agency remains at all times under the control of the Minister, and, in this respect, the Minister may issue a directive to the agency, with which it must comply.[297]

The Act provides for the Minister to intervene in the operations of an agency[298] if, *inter alia*, the agency is being mismanaged or has failed to comply with the duties of the Act or a directive from the Minister.[299] The Minister may issue a directive to the agency and withhold any financial assistance until the directive is followed.[300] Failure to comply with a directive will result in the Minister assuming the powers and duties of the agency, but only after it has been given the opportunity to make submissions.[301] This power extends to assigned powers and duties, as the Act provides that the 'Minister may do anything which the catchment management agency might otherwise be empowered or required to do by or under this Act, to the exclusion of the catchment management agency'.[302]

An agency can be disestablished where defunct or if it is no longer needed.[303] It is also permissible for the purposes of reorganising the water management institutions in the area, provided it will serve the interests of effective water resource management.[304]

[296] S 73.

[297] S 74.

[298] S 87.

[299] S 87(1)(a), (c) and (f).

[300] S 87(i) and (ii).

[301] S 87(3); Once the Minister is satisfied that the agency is able to exercise its powers and duties again, the situation will revert [see S 87(4)(d)].

[302] S 87(4)(a).

[303] S 88(1)(b) and (c).

[304] S 88(1)(a).

The Minister may direct a water management institution or agency to recover charges for water use from water users in the area.[305] In terms of the Act, however, the agency is, together with the water users, jointly and severally liable for these charges, subject to the entitlement to recover them from the water users.[306] This may be useful at a national level to compel an agency to comply with their financial responsibilities.

There are two additional types of organisations that the Minister is empowered to create. The Act makes provision for the creation of localised water-user associations ('WUA'), although these do not fulfill any management functions unless the requisite powers and duties are delegated to them.[307] These associations are body corporates consisting of water users who undertake similar water-related activities for their mutual benefit.[308] The rules regarding the disestablishment relating to catchment manage agencies, are equally applicable in the context of water user associations.[309]

Water user associations took over the role of irrigation boards under the old water management regime.[310] The transformation of the existing WUAs and establishment of new ones for the purposes of creating better gender and racial representation has been slow.[311] The Strategy has consequently highlighted this as a problem area that requires strategic intervention in order to promote the goals of transformation.[312] It is at this level that the Department aims to provide support and address inequitable access to water services for rural farmers.[313] Many of the

[305] S 58(1).

[306] S 58(3).

[307] S 63 read with s 1 and sched 5; M Kidd (note 8 above) 79.

[308] S 91 – 97. For further information see G R Backeberg (note 12 above) 114; H Mackay (note 16 above) 63.

[309] S 96.

[310] According to the Strategy (2013) 67, approximately 92 irrigation boards have merged into 50 water user associations since 1998. There are still 129 water boards established under the 1956 Water Act that must still be converted into water user associations.

[311] 40 new WUAs have been established in the past 15 years. See Strategy (2013) 60 and 67.

[312] Strategy (2013) 67.

[313] Strategy (2013) 67.

existing lawful uses are held by commercial white farmers as a historical consequence of Apartheid, which further exacerbates the inequality of access to water in the context of agriculture.[314]

The Minister can, in addition to the creation of water user associations, establish advisory bodies,[315] as well as bodies for the purpose of implementing international agreements in the context of water.[316] Advisory committees will typically not have any powers, although the Minister may delegate powers to them.[317] The Minister is not obliged to create advisory committees, in all but one situation: an advisory committee *must* be established when the governing body of a Catchment Management Agency is being created.[318] One of the types of advisory committees that may be created is called a Catchment Management Forum ('CMF'). A CMF is intended to support a catchment management agency in the capacity of a representative forum to further public participation and as such, it is not envisioned that CMFs will be provided with any delegated authority.[319]

3.1.4. Classification of Water Sources

Thus far, the nature of the institutions that manage water resources, as well as the mechanisms used to award water rights have been discussed. This part of the chapter will discuss the novel measures implemented by the National Water Act to measure the quality and quantity of water resources, and to facilitate proper decision-making processes and further the protection of water resources. Renewable resources must be used in such a manner that their 'integrity is not jeopardised'.[320] This necessarily requires an ongoing assessment of the status of

[314] S Movik and F de Jong (note 137 above) 71. For a discussion on commercial white land ownership, see D Hallowes and M Butler 'Power, poverty and marginalized environments' in D A McDonald (ed) *Environmental Justice in South Africa* (2002) 61 – 63.

[315] Ch 9 of the Water Act, s 99; H Mackay (note 16 above) 63; M Kidd (note 8 above) 79.

[316] Ch 10 of the Water Act; M Kidd (note 8 above) 79.

[317] Strategy (2013) 69.

[318] Strategy (2013) 69.

[319] Strategy (2013) 66.

[320] S 4(a)(vi).

the resource. In this respect, the South African Water Quality Guidelines establish the parameters for water quality depending on the context of its use.[321] In addition, the approach to water management as required by the Act may assist in this process. This is discussed at Chapter 6. The Act introduces a number of mechanisms aimed at the protection of water resources, including the establishment of a classification system and the Reserve.[322] As per the Strategy, the different water sources are required to be classified and gazetted over the next five years to properly protect these sources.[323] The classification system is prescribed by the Minister, as well as the definition of the class and resource quality objectives of every significant water resource in the country.[324] There are three possible water classes, depending on how much water is used and to what extent the ecological state of the water is changed from its original condition.[325] This process, therefore, allows for a differentiation between water sources (which can be a watercourse, surface water, estuary or aquifer),[326] where some may be classified as requiring a higher degree of protection. Where a certain water class requires more protection, the available water for use (that is, the Reserve) will be affected accordingly.[327]

The quantity and quality of water found in a water resource is termed the 'Reserve' as per the Act. The Reserve must be determined once water resources have been classified, as discussed above. The Reserve consists of an ecological component, aimed at ensuring sufficient water remains in an environment to

[321] See J Glazewski (note 3 above) 618.

[322] Parts 1, 2 and 3 of Ch 3 of the Act. See also GNR 810 of 17 September 2010: Regulations for the establishment of a water resource classification system. See further H Thompson (note 11 above) 134; H Mackay (note 16 above) 57; D du Toit, S Pollard and R Pejan 'A rights approach to environmental flows: What does it offer?' (2009) *The Association for Water and Rural Development* 3.

[323] Strategy (2013) 43.

[324] S 12 read with s 13. Prior to the formal classification, s 14 required a preliminary determination of the class of water resources to be established.

[325] GN R810 of 17 September 2010: Regulations for the establishment of a water resource classification system reg 3.

[326] S 1(xxvii) of the National Water Act.

[327] H Mackay (note 16 above) 60.

preserve a water source.[328] This commitment of water to being preserved for ecological purposes evidences an understanding of the integral relationship that exists between humans and the environment, and the necessity to preserve the latter for the well-being of the former.[329] The second component is dedicated to ensuring that the basic needs of human requirements are satisfied.[330] At present, this has been established as 25 litres per person per day.[331]

The Strategy must set out the principles for establishing the Reserve.[332] The Strategy is, in terms of the requirements laid down by the Act, also required to state the quantity of water available in each management area, as well as the surpluses and deficits in each.[333] The Strategy should also provide for the transfer of water between areas with surpluses to those areas experiencing deficits.[334] In respect of the quality of water, the Strategy must set out the objectives in relation thereto, and not the actual quality of the water as is required in terms of quantity.[335]

Once the Reserve has been established, the Minister, Director-General, organ of state or other water management institution is bound by this determination, and must give effect thereto in the exercise of its powers and duties.[336] Similarly, the Reserve must be factored into the decision-making process upon issuing an authorisation or license for water use.[337] In addition, the class and resource quality

[328] S Movik and F de Jong (note 137 above) 71; M Kidd (note 8 above) 76; A Gowlland-Gualtieri 'South Africa's water law and policy framework: Implications for the right to water' (2007) 3 *International Environmental Law Research Centre* 4.

[329] P H Gleick 'A look at twenty-first century water resource development' (2000) 25 *Water International* 132.

[330] S Movik and F de Jong (note 137 above) 71; M Kidd (note 8 above) 76.

[331] S 9 of the Water Services Act read with reg 3(b) of GNR509 of 8 June 2001: Regulations relating to compulsory national standards and measures to conserve water. See 64 above; S Movik and F de Jong (note 137 above) 71.

[332] S 6(1)(b)(i).

[333] S 6(1)(e) and (f).

[334] S 6(1)(g).

[335] S 6(1)(h).

[336] S 18.

[337] S 27(j).

objectives must be taken into account by the relevant authority prior to the award of an authorisation or license for water use.[338] The Minister has the discretion to determine the content of the resource quality objectives, and can include factors such as the water level, the status of the ecosystem and the regulation of any activity that may affect the quantity or quality of the resource.[339] The importance of the classification process has been reiterated by defining it as a key principle in water protection.[340]

3.2. The Water Services Act

The Water Services Act (the 'Services Act') provides that the National Government is the custodian of water resources.[341] It is argued that even though the terminology used is different, trusteeship and custodianship require the same obligations to be satisfied by the state – that is, to act at all times in the public interest, in accordance with the established constitutional mandate. Both trusteeship and custodianship pertain to the duties of the state in relation to the same resource, that is, water. While the Services Act requires custodianship, it does not stipulate what this entails. However, given that water is to be treated as part of a unitary system, it is argued that custodianship and trusteeship of water entail the same thing, and therefore require the same duties. Moreover, the constitutional right of access to water must be read together with the constitutional right to an environment that is not harmful to health or well-being as set out in section 24.

The objectives of the Services Act are consistent with the purposes of the National Water Act as well as section 27 of the Constitution.[342] The Services Act confirms the right of access to a basic water supply and sanitation.[343] While the National

[338] S 27(g).

[339] S 13(1)(b) read with s 13(3).

[340] Strategy (2013) 43.

[341] Preamble read together with s 11(1) of the Water Services Act.

[342] M Kidd (note 8 above) 82.

[343] S 2(a) read with s 3(1); M Kidd (note 8 above) 81.

Water Act is concerned with the management of water, the Services Act has a different focus – namely the provision of a safe and reliable water supply and sanitation. The Services Act requires, inter alia, standards and norms for the provision of water services.[344] It also requires that information be collected in a national database as well as distributed accordingly.[345] The Services Act provides for water service providers to be held accountable and the promotion of effective management and conservation strategies.[346]

The Services Act requires the establishment of conditions of use to be created by water service providers, relating to the structuring and payment of tariffs, as well the circumstances under which the discontinuation of water services is permitted, and the manner in which this is to be effected.[347] These conditions must also promote conservation and demand management by implementing the appropriate measures.[348] The Minister may implement prescribed national standards to regulate, *inter alia,* the quality of water as well as the sustainable and efficient use of water.[349] In particular, the Minister must consider the impact of water services on the environment, the goals of equitable access to water, and the duties of the National Government as custodian.[350] It is permissible for the Minister to differentiate between types of users on the basis of socio-economic factors and the physical and geographical attributes of an area.[351]

A number of institutions are created by the Services Act to ensure the proper implementation of the Act[352] and compliance with the constitutional duties of providing access to water. For example, the Act allows for the establishment of

[344] S 2(b) and 9; M Kidd (note 8 above) 81.

[345] S 2(h).

[346] S 2(i) and (j).

[347] S 4 of the Services Act. See also *Mazibuko (CC)* para 115 – 124 where the court held that the suspension of water supply in the context of pre-paid meters (where credit has run out) does not result in the discontinuation of water services.

[348] S 4(2)(c)(vi) of the Water Act.

[349] S 9(1) of the Services Act.

[350] S 9(3) of the Services Act.

[351] S 9(2) of the Services Act.

[352] M Kidd (note 8 above) 82.

water boards which are responsible for the delivery of water services.[353] However, there are institutional difficulties with these water boards, and the Strategy has suggested the creation of Regional Water Utilities to manage water services at a regional level. The intention of this is to consolidate power into a simplified and clearer system, and to strengthen the functioning of service delivery at a municipal level to remedy weak performance in this respect.[354] The Strategy has set a goal for the establishment of nine such institutions by 2015.[355]

The Services Act also creates water services authorities at a municipal level for the provision of water supply and sanitation.[356] Water service authorities are required to apply for a water use license from either the Department of Water Affairs or a catchment management agency where appropriate for the abstraction and discharge of water. These water services authorities are in this respect treated as an ordinary water user and must comply with the same requirements, including the use of water, subject to any restrictions contained in the license.[357] Furthermore, a wastewater treatment work will fall within the ambit of the 'owner, controller or occupier of land' for purposes of the National Water Act, and therefore has a duty to mitigate and prevent pollution in terms of section 19.[358] Water service providers are parties that enter into a contract with a water services authority to render the service of supplying water services.[359] Similarly, these bodies fall within the purview of the National Water Act and are subject to the same restrictions as users of water.[360]

[353] S 28.

[354] Strategy (2013) 59.

[355] Strategy (2013) 61.

[356] Strategy (2013) 68. They are also afforded jurisdiction to perform services in terms of s 12 of the Municipal Systems Act, which entails a 'constitutional responsibility for planning, ensuring access to and regulating provision of water services (water supply and sanitation) within their area of jurisdiction'.

[357] Strategy (2013) 68.

[358] S 21, 27 and 19 of the Water Act; Strategy (2013) 68.

[359] These arrangements are governed by s 19, 20 and 22 of the Services Act; Strategy (2013) 68.

[360] Strategy (2013) 68.

Both water service authorities and water service providers are required to ensure that the functioning of their institutions is consistent with the national goals of water management.[361] They are required to engage with catchment management strategies pertinent to their jurisdiction.[362] Water conservation and water demand management must be central to the planning process to ensure that conservation and demand management is achieved.[363] Finally, the Strategy requires these institutions to implement Integrated Water Resource Management to ensure that plans are coordinated and aligned between the various levels of government.[364] Integrated Water Resource Management is more comprehensively discussed in Chapter 6.[365]

Water service authorities are required to update their development plans in terms of the requirements and intervals prescribed by the Minister.[366] This development plan must include details of water users and usage in the area and indicate the time frame for the implementation thereof.[367] The plan is also required to set out the number of persons who do not have a basic water and sanitation supply, and where it is not possible to provide the aforementioned persons with the necessary services within the next 5 years, the reasons therefore must be stated, as well as a reasonable time frame for implementing such services.[368] With respect to environmental concerns, the measures aimed at the protection and conservation of the environment must be set out by the developmental plan.[369]

The Water Services Act provides a list of offences for which contravention can result in imprisonment and/or a fine.[370] In addition, the offence is extended to an

[361] Strategy (2013) 68.

[362] Strategy (2013) 68.

[363] Strategy (2013) 68.

[364] Strategy (2013) 68.

[365] See below at 236.

[366] S 16 Services Act.

[367] S 13 Services Act.

[368] S 13(g) and (i) Services Act.

[369] S 13(j) Services Act.

[370] S 82(2) Services Act.

employer both where express or implied consent was provided, or if the employer is vicariously liable.[371] The types of offences include failure to stop wasting water after notice from the relevant authority, failing to provide the relevant information when lawfully instructed to do so, and any other use of water or disposal of effluent in contravention of the Act.[372]

4. Legal Mechanisms for Water Management: Water Regulations

In the context of the National Water Act, any reference to 'the Act' specifically includes any regulations made in accordance therewith.[373] Contravention of these regulations could result in a fine or imprisonment for a period of up to 5 years.[374]

The Minister has the power to make regulations for the purpose of giving effect to the Act,[375] which must be approved by both the National Assembly and the National Council of Provinces.[376] The Minister is similarly entitled to make regulations to further guide the functioning of catchment management agencies,[377] as well as regulations to guide advisory bodies.[378] The Minister may also make regulations to guide the management, use and charges for any government waterworks.[379] It is permissible for regulations to be made that guide the collection of data and monitoring of information systems.[380]

[371] S 82(3) Services Act.

[372] S 82(1) Services Act.

[373] See s 1 of the Water Act. Thus far, 45 regulations have published in accordance with the National Water Act. See Addendum A.

[374] S 69(2).

[375] S 69.

[376] S 70.

[377] S 90.

[378] S 100.

[379] S 116.

[380] S 143.

The National Water Act requires that the class of a water resource, as well as its quantity and quality, must be established.[381] The mechanism through which this is done is the determination of the Reserve. Regulations provide the procedures required to determine a class of water, the Reserve, as well as resource quality objectives.[382] They are to be used by decision-makers in accordance with the Act. Again, the Act makes it clear that the Minister must give effect to the determination of a water resource, the Reserve as well as the resource quality objectives as defined by the Act and set out by the Regulations.[383]

The Water Services Act[384] allows the Minister to make regulations relating to the policy statements, business plans, financial statements, annual reports and other aspects of the functioning of a water board.[385] These regulations may differ between the water boards and there is no requirement for consistency between these regulations.[386] The Minister is required to take into account *inter alia* the principles of accountability, transparency and good governance,[387] as well as the purposes of the Act and the interests of consumers.[388]

[381] The quality of a water resource is defined in the Act to mean the quality of 'all of the aspects of a water resource including the quantity, pattern, timing, water level and assurance of instream flow; the water quality including the physical, chemical and biological characteristics of water; the character and condition of the instream and riparian habitat; and the characteristics, condition and distribution of the aquatic biota'; M Kidd (note 8 above) 75.

[382] Read with s 12 - 18 of the Water Act.

[383] S 15 and 18 of the Water Act.

[384] The regulations enacted in terms of the Water Services Act are GNR 509 of 8 June 2001: Regulations relating to compulsory national standards and measures to conserve water, GNR 652 of 20 July 2001: Norms and standards in respect of tariffs for water services in terms of S 10(1) of the Water Services Act (Act No. 108 of 1997) and GNR 980 of 19 July 2002: Water services provider contract regulations.

[385] S 49(1) Services Act.

[386] S 49(2) Services Act.

[387] As set out by s 195 of the Constitution.

[388] S 49(3)(a), (b) and (e) of the Water Act.

5. Legal Mechanisms for Water Management: The National Water Resource Strategy and Catchment Management Strategy

The National Water Resource Strategy (the 'Strategy') gives content to the day-to-day functioning of trusteeship.[389] It is established in accordance with the Constitution and the Water Act, but is far more detailed in respect of how it aims to achieve the goals that are established by both. In the context of trusteeship (that is, the duties of protection, use, development, conservation, management and control of water resources), the Strategy must set out the strategies, objectives, plans, guidelines and procedures of both the Minister and the institutional arrangements.[390] In this respect, the purposes of the Water Act and the objectives established by the Water Services Act must be taken into account, as well as existing government policy.[391] The Strategy must be implemented when any power or duty is exercised in terms of the Water Act.[392] Accordingly, the Minister, Director-General, organ of state or other water management body must exercise their powers and functions in accordance with the Strategy.[393] The state recently reiterated the importance of water to our quality of life in the latest National Water Resource Strategy.[394] However, the current approach is flawed to the extent that the Strategy is not required to incorporate aspects relating to water services and sanitation.[395]

[389] Strategy (2013) 22; M Kidd (note 8 above) 83; LegalBrief 'New legislation will ensure greater equity in water resource allocation' *LegalBrief Policy Watch* 22 May 2013.

[390] S 6(1)(a) of the Water Act.

[391] S 6(1)(a) of the Water Act.

[392] S 5(5) of the Water Act.

[393] S 7 of the Water Act; M Kidd (note 8 above) 83.

[394] Strategy (2013) 37.

[395] GN 888 of 30 August 2013 National Water Policy Review: Updated policy positions to overcome the water challenges of our developmental state to provide for improved access to water, equity and sustainability7.

Section 5 of the National Water Act requires the establishment of a Strategy that must be reviewed at least every five years.[396] The Act provides a detailed list of requirements for the content of the Strategy, including the establishment of the Reserve,[397] mechanisms to promote cooperative governance[398] and principles relating to water conservation and demand management.[399] These aspects of the Strategy are discussed in more detail in Chapter 5 below.

The first Strategy was introduced in 2004 and was described by the Department as 'the "blueprint" for water resources management in the country'.[400] This Strategy highlighted the need for equitable access to water, water conservation and demand management, and the development of both institutions and regulations for the purposes of water management.[401] However, the 2013 Strategy shows that little progress has been made in the implementation of these goals. Consequently, the Strategy Implementation Plan aims to prioritise key programmes that further these goals.[402] The vision of the latest Strategy is 'sustainable, equitable and secure water for a better life and environment for all', echoing the broad goals of the Act.[403]

The latest Strategy was approved in July 2013,[404] and it aims, amongst other things, to[405]

> facilitate the proper management of the nation's water resources, provide a framework for the protection, use, development, conservation, management and control of water resources for the country as a whole, provide a framework within

[396] S 5(4)(b) of the Water Act; M Kidd (note 8 above) 83.

[397] S 6(1)(b)(i) of the Water Act.

[398] S 6(1)(d) of the Water Act.

[399] S 6 of the Water Act; M Kidd (note 8 above) 83.

[400] Department of Water Affairs *Proposed National Water Resource Strategy 2 [NWRS 2]* Summary (2012) 7.

[401] Strategy (2013) 9.

[402] Strategy (2013) 9 and Ch 7.

[403] Strategy (2013) v.

[404] J Yeld 'SA's water Strategy approved' *IOL* 4 July 2013; S Kings 'Molewa: SA won't run out of water' *Mail and Guardian* 3 July 2013.

[405] Strategy (2013) 1.

> which water will be managed at regional or catchment level, provide information about all aspects of water resource management and identify water-related development opportunities and constraints.

Equitable access is again a priority, and the Strategy aims to fulfill this goal by better utilising the powers of licensing and water allocation.[406]

The Strategy states that the three goals of water management are equity, sustainability and efficiency.[407] In terms of the requirement of equity, the Strategy aims to create equity in terms of the access, use and benefits of water. This second requirement, namely sustainability in terms of use of water, is important in the context of management. It requires the sustainable use and protection of water by 'striking a balance between water availability and legitimate water requirements'. The third component requires the 'efficient and effective water use for optimum social and economic benefit'.[408]

The 2013 Strategy states that South Africa is not yet facing a water crisis.[409] However, it is clear that this is inevitable if a number of issues facing water management are not addressed. The weaknesses highlighted include water conservation and reform (including access), outstanding infrastructure maintenance and improving technical and management skills in the sector.[410] In addition, the challenges faced include the poor governance of water resources, lack of access to water, loss of water due to pollution and poor infrastructure, as well as a skills' deficit in the sector.[411] Many of the biggest challenges facing the management of water require both time and intensive financial investment to remedy.

[406] P Saxby 'Department plans pro-poor amendments to water law' *LegalBrief Policy Watch*.

[407] Strategy (2013) 47.

[408] Strategy (2013) 7; M Kidd (note 8 above) 83.

[409] Strategy (2013) 7.

[410] Strategy (2013) 23.

[411] Strategy (2013) 7; M Madlala 'Skills shortfall has impact on water' *IOL* 9 July 2013.

Individual catchment management strategies[412] must also be created which coincide with the catchment management areas.[413] The catchment strategies are required to be consistent with the national Strategy.[414] Similar to the national Strategy, it must set out the strategies, objectives, plans, guidelines and procedures for the particular agency, to facilitate the satisfaction of the requirements of trusteeship.[415] The catchment strategies are also required to take into account the national and regional plans enacted in terms of other legislation, including the Water Services Act.[416] Further, they must take into account the class of the water resource, the Reserve, and where appropriate, international obligations.[417]

6. Policies in Terms of the Act

Policies are not legally enforceable, and thus if the state is to be held accountable for its management of resources, this must be done on the basis of an infringement of the Act.[418] However, as per the *Grootboom* case,[419] one can evaluate whether the policies and strategies that have been implemented satisfy the required constitutional obligations.[420] The question is then whether the policies themselves are reasonable, and further, whether they are being reasonably implemented.[421] As was stated above, if it is shown that these policies do not take cognisance of the

[412] S 8 of the Act. M Kidd (note 8 above) 75.

[413] See discussion above (note 268 above).

[414] S 9(b). The catchment management strategies, insofar as they are consistent with the national Strategy, do not mirror each other in all respects. The respects in which the national and catchment Strategy requirements differ are as follows: the catchment Strategy requires cognisance of 'geology, demography, land use, climate, vegetation and waterworks in the area', thus requiring a far greater level of specificity. The plans for the allocation of water must also be established in respect of catchment strategies. Finally, the catchment Strategy must set out mechanisms to enable public participation in the context of management of water generally.

[415] S 9(c).

[416] S 9(f).

[417] S 9(a).

[418] H Thompson (note 11 above) 134.

[419] See discussion above (note 114).

[420] See discussion above (note 115).

[421] See discussion above (note 115).

most vulnerable in society, they will be found to be unreasonable.[422] However, as the *Mazibuko* case[423] evidences, the court will have to entertain a delicate balancing exercise, particularly where the managing institution can show that genuine attempts have been made towards addressing socio-economic issues.

To redress the inequalities of access to water, the Water Allocation Reform Programme was implemented in 2001.[424] This programme aims to address the goals of ensuring equitable access to water by promoting the needs and ensuring the participation of historically disadvantaged persons and the poor.[425] In this respect, water may be specifically set aside within a catchment management area in order to be allocated to certain groups of persons. Alternatively, general authorisations may be granted for specific areas where there is a concentration of persons that will benefit from the allocation in terms of redressing inequality and poverty.[426]

As stated above, the National Water Policy Review was introduced in August 2013, with the intention of facilitating the process to introduce new legislation that combines the National Water Act and the Water Services Act.[427] The focus of this consolidated approach will be on developmental water management. The purpose of this amendment is to promote the goals of equity, access and transformation, managing water in the whole water value chain rather than separating it into the management of the resource and the provision of water services, and finally, establishing a single Strategy that focuses the goals of both components.[428] To do this, this policy aims to initiate the process for unifying the National Water Act and Water Services Act. This approach has been criticised as the failings in water management to date do not necessarily arise from difficulties

[422] See discussion above (note 121).

[423] See discussion above (note 76).

[424] M I Msibi and P Z Dlamini (note 16 above) 23.

[425] Strategy (2013) 51.

[426] Strategy (2013) 45.

[427] National Water Policy Review (2013) 5; P Vecchiatto (note 245 above).

[428] National Water Policy Review (2013) 5 – 8.

with the legislative framework, but rather as a consequence of poor implementation by the administration.[429]

7. Concluding Remarks

The purpose of this chapter has been to set out the legislative framework within which water management must operate. It discussed this hierarchical framework consisting of the Constitution, legislation and regulations, and finally the policies and strategies enacted in accordance therewith.

The Constitution as the source of authority for water management was discussed,[430] including an explanation of the rights to a healthy environment,[431] as well as the rights of access to water.[432] In this respect, the Constitutional Court has stated that trusteeship is a by-product of these rights as contained in the Bill of Rights, with the result that trusteeship should be viewed as both a constitutional and legislative doctrine.[433] The National Water Act and the Water Services Act have legislatively made the state the trustee of water resources.[434]

It was also established that the test against which the courts measure state action is to use a standard of reasonableness for the assessment of the state's duties as established in the *Grootboom* case and confirmed in the *Mazibuko* case.[435] Further rights that are connected to sections 24 and 27 are the rights to property, the right to dignity and equality, the right to information, the right to just administrative action and the right of access to courts.[436] In addition, the constitutional clause that requires the Bill of Rights to be interpreted in a manner that promotes the

[429] See Editorial 'New water law won't help much' *Business Day Live* 5 September 2013.

[430] Note 17 above.

[431] Note 34 above.

[432] Note 68 above.

[433] Note 17 above.

[434] Note 172 above.

[435] Note 70 above.

[436] Note 17 above.

spirit, purport and objects thereof will also be relevant, as well as the limitations clause, as discussed above.[437]

The National Water Act is the primary legislative vehicle for the management of water and it aims to promote equity, sustainability and efficiency.[438] It has been created in accordance with the constitutional goals as set out above. The state has been made the trustee of the protection, use, development, conservation, management and control of water.[439] The Act further requires that these duties of water management must be fulfilled in accordance with the goals of sustainability, equity, in the beneficial interest of all persons, and finally, constitutionally.[440] In this respect, the Minister, as the nominated trustee, is unable to perform each and every aspect of water management herself and is permitted to delegate and assign her duties in certain circumstances.[441] However, the confusion between delegation and assignment created by the Act may result in the duties of trusteeship being thwarted.[442] This notwithstanding, assigned powers will still have to be exercised in accordance with the purposes of the Act, which more than sufficiently cover the requirements of trusteeship as set out in section 3.[443]

In terms of the Act, water is no longer capable of private ownership and is instead viewed as a collective resource.[444] Different permissible uses are established by the Act which requires licences for certain uses to be obtained from the licensing authority.[445] While this process is intended to further the goals of equitable access, administrative backlogs have seen huge delays in these applications, and some

[437] Note 159 above.

[438] Note 180 above.

[439] Note 183 above.

[440] Note 185 above.

[441] Note 192 above.

[442] Note 199 above.

[443] Note 210 above.

[444] Note 211 above.

[445] Note 228 above.

authors point out that this system of administrative discretion is too susceptible to corruption and maladministration.[446]

To further the goals of water management that encourages public participation, a number of different types of water institutions are created by the Act to ensure the decentralisation of power to the lowest appropriate level.[447] These institutions include catchment management agencies, water user associations, water boards and water service providers.[448] The various mechanisms for the classification and classing of water resources, as well as the establishment of the Reserve were introduced.[449] In addition, this chapter discussed the entitlements of the Minister to create regulations,[450] as well as the relevance of the National Water Resource Strategy and policies to water management.[451]

While the framework within which trusteeship operates has been established, the guiding principles that inform trusteeship and consequently decision-makers, has not yet been addressed. The purpose of the following chapter is to evaluate whether a historical or comparative investigation can be of assistance in understanding the content of trusteeship.

[446] See Ch 8 (note 101 below).

[447] Note 266 above.

[448] Note 269 ff above.

[449] Note 328 above.

[450] Note 373 above.

[451] Note 389 ff above

Chapter Four:

EXISTING ATTEMPTS AT CONCEPTUALISING THE NOTION OF TRUSTEESHIP IN WATER LAW

1. Introduction

The previous chapters set out the historical overview of water law in South Africa and the current legal framework implemented after the advent of the Constitution. These chapters have demonstrated that the core concept of trusteeship is in need of explanation and proper definition. The nature of the relationship between the state and those entitled to water rights by virtue of the legal framework is not clearly established. As a result, much hinges on the understanding attached to trusteeship. Due to the inadequate definition of trusteeship, it is unclear if the legal framework simply requires that the state perform its administrative functions, or whether trusteeship requires something more than this. It is also uncertain whether ownership of this resource is possible and whether it is the nation, as a collective entity, that owns water resources.[1]

Ever since the concept of trusteeship was introduced into South African water law, scholars have attempted to give content to it. Some of these attempts are rooted in an historical analysis of the categorisation of property types to which water may belong. Other attempts look to comparative law to find answers. The purpose of this chapter is to evaluate both these sets of attempts, to determine whether the historical roots of South African common law can be of any further assistance in shedding light on the concept of trusteeship; and whether a comparative evaluation of foreign law can assist in an interpretation of trusteeship.

[1] However, see below at note 118.

2. Reliance on South African Legal History and Theory

Whilst trusteeship has both a constitutional and statutory basis,[2] it is helpful to evaluate whether it is also anchored in the common law. To the extent that trusteeship has common law roots, this may assist in providing content to the duties of trusteeship. The purpose of this section is to discuss the common law that may be of relevance to trusteeship.

2.1. Water as Public Property and the Notion of Trusteeship in Common Law

Already in ancient Rome, public aqueducts and the provision of water were important. So important, in fact, that officials – the *hydrophylacas*- were appointed as water custodians and entrusted with the management of city water.[3] Scholars have seen a reflection of the requirements of the ancient property law classifications of public property in the modern statutory requirements of trusteeship.[4] The trusteeship provision in the National Water Act requires the state to act as trustee of water for the public benefit,[5] which, as will be explained in this chapter, mirrors the Roman and Roman-Dutch concept of public things called *res publicae.*[6] As a result, some commentators have stated that water should be

[2] See Ch 3 (note 171 above).

[3] C. 11. 42. 10, as translated by E F Ware *Roman Water Law* (1905) §169.

[4] E Van der Schyff 'Who "owns" the country's mineral resources? The possible incorporation of the public trust doctrine through section 3(1) of the Mineral and Petroleum Resources Development Act 28 of 2002' (2008) 4 *TSAR* 757; L V Noeth *Common law perspectives on the concept of public trusteeship* (Unpublished LLM thesis, North-West University, 2011) 5.

[5] The National Water Act in s 3 provides the following: (1) As the public trustee of the nation's water resources the National Government, acting through the Minister, must ensure that water is protected, used, developed, conserved, managed, and controlled in a sustainable and equitable manner, for the benefit of all persons and in accordance with its constitutional mandate. (2) Without limiting subsection (1), the Minister is ultimately responsible to ensure that water is allocated equitably and used beneficially in the public interest, while promoting environmental values. (3) The National Government, acting through the Minister, has the power to regulate the use, flow and control of all water in the Republic.

[6] The Mineral and Petroleum Resources Development Act 28 of 2002 introduces a similar legislative scheme for the management of mineral resources. By extension, therefore, it is possible

classified as *res publicae*.[7] On the other hand, water as a resource has been characterised as *res omnium communes* (hereinafter '*res communes')* or common property, by both scholars and the Supreme Court of Appeal.[8] The purpose of this section is to examine these propositions and the varying characteristics of each category.

To understand the conflicting approaches to water as a resource today, it is useful to look to the origins of the classification of public and common property. The distinctions created by Roman and Roman-Dutch law between different categories of things are discussed below.[9] By way of introduction, *res communes* were things, such as running water, air and the ocean that belonged to all.[10] *Res publicae* were things that are deemed to be public property: they collectively belonged to a civil community and were intended for the use of this civil community.[11] For example, rivers with perennial flow, public streets and squares, harbours and highways were classified as *res publicae*.[12] Finally, *res universitatis* were the body of things that belonged to a corporate body, such as a city, and included theatres, race courses, markets, guilds and churches.[13] Against this

to argue that minerals and water should be classified in the same manner and afforded the same protective mechanisms.

[7] See, *inter alia*, E van der Schyff and G Viljoen 'Water and the public trust doctrine – a South African perspective' (2008) 4 *TD: The Journal for Transdisciplinary Research in Southern Africa* 343; A Burger 'Roman water law (part 2)' (2007) *TSAR* 318. However, cf H Thompson *Water Law: A Practical Approach to Resource Management and the Provision of Services* (2006) 153.

[8] *Mostert Snr and another v S* [2010] 2 All SA 482 (SCA) para 22; H Thompson (note 7 above) 152 – 155.

[9] See 124 ff below. See also J Glazewski *Environmental Law in South Africa* (2013) 16-9 – 16-10; G J Pienaar and E van der Schyff 'The public management of water resources in South Africa' (2008) *Forum on Public Policy* 1.

[10] Justinian *The Institutes of Justinian – Book II: The Law of Property* § 146; R W Lee *The Elements of Roman Law* 4ed (1956) 35, 43; R W Leage *Roman Private Law Founded on the 'Institutes' of Gaius and Justinian* 2ed (1909) 122; E Poste *Elements of Roman Law by Gaius* 3ed (1890) 152; P J Badenhorst, J M Pienaar and H Mostert *Silberberg and Schoeman's The Law of Property* 5ed (2006) 33; T C Sanders *The Institutes of Justinian* 7ed (1934) xlviii. However, see J Glazewski (note 9 above) 16-10 who states that *res communes omnium* entailed ownership by the state.

[11] See note 29 below.

[12] Inst 2. 1. 2.; D 1. 8. 4. 1.; P J Badenhorst, J M Pienaar and H Mostert (note 10 above) 26; M Kaser *Roman Private Law* 4ed (1984) 101.

[13] Inst 2. 1. pr, 2. 1. 6.; D 1. 8. 6. 1.; P J Badenhorst, J M Pienaar and H Mostert (note 10 above) 29.

background, the positioning and development of *res publicae, res communes* and *res universitatis* in Roman law and Roman-Dutch law, as well as the overlap between the three classifications of public property will now be discussed. For the purposes of this thesis, the most important classifications are *res communes* and *res publicae*. For the sake of completeness, *res universitatis* is discussed to show how public property came to be finessed.

2.1.1. Property Law Classifications Under Roman Law

From the outset, all things in terms of the Roman private law of things were divided either into *jus publicum* (public law) or *jus privatum* (private law).[14] The former was concerned with the constitution of the Roman State, administrative, criminal and procedural law as well as the *jus sacrum* (sacred law).[15] The latter, that is, *jus privatum*, regulated legal relationships between individuals in relation to their rights to a thing.[16]

Within the division of the private law of property, things could be appropriated and owned (that is, they belonged to a private person) or they were incapable of ownership.[17] Things that were capable of being owned, or private property, were called either *res intra commercium* or *res nostro patromonio* (both bearing the same meaning) and were classified as such by the Romans if they held a monetary or commercial value,[18] or if they had the 'capacity to be assigned'.[19]

[14] R W Lee (note 10 above) 35; R W Leage (note 10 above) 38; J Muirhead *The Institutes of Gaius and Rules of Ulpian* (1895) 77; C Salkowski (translated by E Whitfield) *Institutes and History of Roman Private Law* (1886) 333; J T Abdy and B Walker *The Commentaries of Gaius and the Rules of Ulpian* (1876) 71; E Poste (note 10 above) 147; A Borkowski and P du Plessis *Textbook on Roman Law* 3ed (2005) 154.

[15] C P Sherman *Roman Law in the Modern World* Vol II (1922) 15 – 16.

[16] *The Institutes of Justinian* Book I Title I *Of Justice and Law* § 54; R W Lee (note 10 above) 35, 43; J T Abdy and Bryan Walker (note 14 above) 71. This should be compared to the African Customary tradition of regulating relationships – see below at Ch 7 note 2.

[17] J A C Thomas *The Institutes of Justinian* (1975) 65. This discussion does not include the categories of things termed movable and immovable, corporeal and incorporeal, as they do not fall within the ambit of this paper.

[18] *The Institutes of Justinian* Book II The Law of Property § 146; R W Lee (note 10 above) 35, 43; D Nasmith *Outline of Roman History from Romulus to Justinian* (1890) 403; E Poste (note 10 above) 152; J A C Thomas (note 17 above) 73; R W Leage (note 10 above) 122.

By contrast, *res extra commercium* and *res extra nostrum patrimonium* (also bearing the same meaning) consisted of public property incapable of ownership (that is, they could not be privately owned).[20] Classical Roman law distinguished between common and public property.[21] While common and public property may have had inherent value, their classification resulted in them having no 'legally guaranteeable' worth.[22] Gaius' list of public things incapable of ownership was not comprehensive,[23] and the clear distinctions drawn between *res communes*, *res publicae* and *res universitatis* were not yet present.[24]

Over time, the distinction between common and public property became more finessed, and further categories of public property came into existence.[25] Justinian distinguished between *res divini iuris*, which were things concerning the gods, and *res humani iuris*,[26] which consisted of *res communes*, *res publicae* and *res universitatis*.[27] The listed examples provided by the sources, as well as the reasons for particular classifications under each of these distinctions, remain unclear.[28]

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[19] A M Prichard (ed) *Leage's Roman Private Law* 3ed (1967) 154.

[20] J A C Thomas (note 17 above) 75; E Poste (note 10 above) 153; D H Van Zyl *History and Principles of Roman Private Law* (1983) 128; *The Institutes of Justinian* Book II The Law of Property § 146; R W Lee (note 10 above) 35, 43; D Tamm *Roman Law and European Legal History* (1997) 70.

[21] T Mackenzie *Studies in Roman Law* (1886) 151; W Buckland (revised by P Stein) *A Text-Book of Roman Law from Augustus to Justinian* 3ed (1963) 182; T C Sandars *The Institutes of Justinian* (1903) .

[22] T Mackenzie (note 21 above) 151.

[23] J Crook in H Scullard (ed) *Law and Life of Rome* (1978) 140. See also T Mommsen, P Krueger and A Watson *The Digest of Justinian*Vol IV (1985) 487.

[24] J Crook (note 23 above) 140; E Poste (note 10 above) 147; J A C Thomas (note 17 above) 75.

[25] Insti Gaius 2.1., D. i. 8. 2. (*Superiore libro de jure personarum exposuimus: modo videamus de rebus, quævel in nostro patrimonio vel extra nostrum patrimonium habentur. Quædam enim naturali jure communia sunt omnium, quædum publica, quædum universitatis, quædum nullius, pleraque singulorum, quæ variis ex causis cuique adquiruntur, sicut ex subjectis apparebit).*T C Sandars *The Institutes of Justinian* (1903) 90. A Borkowski and P du Plessis (note 14 above) 154; T Mackenzie (note 21 above) 152; R W Lee (note 10 above) 113-114;

[26] T Sanders *The Institutes of Justinian* (1962) 90; J A C Thomas (note 17 above) 75.

[27] D H Van Zyl (note 20 above) 128; A Watson *The Law of Property in the Later Roman Republic* (1968) 1; J A C Thomas (note 17 above) 75; T C Sandars *The Institutes of Justinian* 7ed (1903) xlv – xlviii; J A C Thomas *Textbook of Roman Law* (1976) 129.

[28] See also L V Noeth (note 4 above) 6, who discusses the uncertainties in the sources on Roman law classifications.

Common property, therefore, came to be referred to as *res communes.*[29] The examples given for common property were the air, the ocean and light.[30] Other authors include flowing rainwater and the water of rivers in this definition of common property.[31] Public property, on the other hand was separated into *res publicae* and *res universitatis* by Justinian.[32] Property, which could be of use and/or belong to the people was termed *res publicae.*[33] Whether or not this property entailed ownership by the state or ownership by the people is unclear.[34] Schulz states that *res publicae* were owned by the state, in a form of public ownership, 'subject to special rules which differed greatly from those applied in private law'.[35] *Res universitatis* was defined as the 'property of public bodies other than the people or the State',[36] and included things owned by a smaller community of people, or a collective body, such as a corporation or municipality.[37] The examples that were commonly given were theatres and race-

[29] D. i. 8. 2. 1.; D. i. 8. 4. *Et quidem naturali jure communia sunt omnium hæc: aer et aqua profluens et mare et per hoc litora maris. Nemoigitur ad litus maris accedere prohibetur, dum tamen villis et monumentis et ædificiis abstineat, quia non sunt juris gentium, sicut et mare.* T Sanders *The Institutes of Justinian* (1962) 90. A Borkowski and P du Plessis (note 14 above) 154; D Nasmith (note 18 above) 403-404.

[30] E Poste (note 10 above) 152; D H Van Zyl (note 20 above) 128; D Tamm (note 20 above) 70 – 71.

[31] Marcian D. 1. 8. 2 pr./1; M Kaser (note 12 above) 101; R W Leage (note 10 above) 122; M Habdas 'Who needs a park or a city square? The notion of public real estate as *res publicae*' (2011) 4 *TSAR* 627.

[32] See also A Borkowski and P du Plessis (note 14 above) 154 who state that prior to the distinction being made between *res universitatis* and *res publicae* both types of property were categorized simply as public property.

[33] D. i. 8. 4. 1.; D xlvii. 10. 13. 17. *Flumina autem omnia et portus publica sunt: ideoque jus piscandi omnibus commune est in portibus fluminibusque.* T Sanders *The Institutes of Justinian* (1962) 91; A M Prichard (note 19 above) 154; E Poste (note 10 above) 147; M Kaser (note 12 above) 101; R W Leage (note 10 above) 122; D H Van Zyl (note 20 above) 128; A Borkowski and P du Plessis (note 14 above) 154; D Nasmith (note 18 above) 403-404; M Habdas (note 31 above) 627.

[34] See however E Van der Schyff *The Constitutionality of the Mineral and Petroleum Resources Development Act 28 of 2002* (unpublished PhD thesis, University of Potchefstroom, 2006) 92. T C Sandars *The Institutes of Justinian* 7ed (1903) xlviii suggests that the state owned things falling within the term *res publicae*.

[35] F Schulz *Classical Roman Law* (1951) 340; M Habdas (note 31 above) 627.

[36] D. i. 8. 6. 1. *Universitatis sunt, non singulorum, veluti quæ in civitatibus sunt theatra, stadia et similia et si qua alia sunt communia civitatium.* A M Prichard (note 19 above) 154; E Poste (note 10 above) 147; T Sanders *The Institutes of Justinian* (1962) 92; C H Monro *The Digest of Justinian* Vol I (1904) 39; C Salkowski (note 14 above); J A C Thomas (note 17 above) 65.

[37] J A C Thomas (note 27 above) 129.

courses.[38] Van Zyl argues that given that both *res publicae* and *res universitatis* were susceptible to the use and enjoyment by the public, there is very little practical difference between them.[39] For example, the town square and public streets could be classified as either *res publicae*[40] or *res universitatis.*

In the context of water specifically, many rules developed that governed the use and enjoyment of water. Marcianus wrote that nearly all rivers are to be considered public property.[41] Public water and their banks were classified as *res publicae*[42] and were the property of the whole community.[43] A public river (or *flumen publicum*) was a river that flowed all year round (that is, perennial in nature), even if the river stopped flowing in times of drought.[44] Perennial rivers were *res publicae* whilst rivers that only flowed seasonally were *res communes.*[45]

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[38] C H Monro (note 36 above) 40; W Hunter (revised by F H Lawson) *Introduction to Roman Law* 9ed (1955) 66. Other authors cite these examples, namely, theatres and marketplaces, as examples of *res publicae.* See D Tamm (note 20 above) 71.

[39] D H Van Zyl (note 20 above) 128-9.

[40] M Kaser (note 12 above) 101.

[41] C H Monro (note 36 above) 40; *Butgereit and Another v Transvaal Canoe Union and Another* [1988] 2 All SA 84 (A) 86.

[42] Paulus D. 43.12.3 (*Flumina publica quae fluunt ripaeque eorum publicae sunt*) as discussed in *Butgereit and Another v Transvaal Canoe Union and Another* 87.

[43] Gaius D. 1.8.1 pr. (Q*uae publicae sunt, nullius in bonis esse creduntur, ipsius enim universitatis esse creduntur)* and Ulpianus D. 50.16.5 (*publica sunt, quae populi Romani sunt*) as discussed in *Butgereit and Another v Transvaal Canoe Union and Another* 87.

[44] Ulpian D. 43. 12. 1. 3. 'Some rivers are public; others not. Cassius defines a public river as a perennial river. This definition, approved by Celsus, appears correct'; Ulpian D 43.12.1.1. 'Some rivers are perennial; some are torrential. A perennial river is one which flows continuously…If, however, a river which has flowed perennially dries up during a certain summer, it is none the less perennial'; Paulus D. 43. 12. 3. *Van Heerden v Wiese* (1880-1884) Buch AC 5 7. 'Rivers which flow (perennially) are public, and their banks are also public' as discussed in E F Ware (note 3 above) 18, 19 and 41 respectively. See the dictum of *Butgereit and Another v Transvaal Canoe Union and Another* 86 – 87:

> 'In D. 43.12.3 it is said: '*Publicum flumen esse Caius definit, quod perenne sit: haec sententia Cassii, quam et Celsus probat, videtur esse probabilis*, i.e. Cassius defines a public river as one which is perennial: this opinion of Cassius, of which Celsus also approves, seems to be acceptable. A river was considered to be perennial even if it dried up during certain summers, but was otherwise perennial.
>
> (See D. 43.12.1.2: . . . *si tamen aliqua aestate exaruerit, quod alioquin perenne fluebat, non ideo minus perenne est*.) In *Van Niekerk*'s case, *supra*, at 372, Innes CJ said the following in this regard: 'The civil law considered all perennial rivers to be public, and the fact that they ceased to flow for a time during exceptional seasons did not render them non-perennial (*Digest*, 43.12.1.2 and 3).'

[45] D H Van Zyl (note 20 above) 128.

The rights afforded to the public as a result of this entitlement were rights of use and access, principally to fish and navigate the harbours and rivers.[46] Lakes, ponds and canals could also be considered public water.[47] Ulpian stated that 'the use of public streams is common to all, just the same as public roads and the shores of the sea', indicating that public streams were regarded as *res publicae*.[48] Water contained in reservoirs was also considered public water. However, permission had to be granted by the 'sovereign' to be entitled to draw water from these sources.[49]

Depending on the size of the water source, or the public opinion of residents in the area,[50] a river (*flumen*) was distinguished in Roman law from a smaller stream or rivulet (*rivus*), the latter being a private water source.[51]

There is some uncertainty as to whether the navigability of a water source was a prerequisite for its classification as *res publica,* although the weightier opinion was that it was not.[52] Ulpian stated specifically that the interdict against using water from public rivers in such a manner that it caused damage to any neighbouring interests was not limited only to navigable waters.[53] The Praetor,

[46] Justinian's *Institutiones* 2.1.2: *Flumina autem omnia et portus publica sunt: ideoque ius piscandi omnibus commune est in portu fluminibusque–* see *Butgereit and Another v Transvaal Canoe Union and Another* 88.

[47] Ulpian D.43. 14. 1. 2-6 as translated in E F Ware (note 3 above) § 59.

[48] Ulpian D. 39. 2. 24. as translated in E F Ware (note 3 above) § 74.

[49] Ulpian D. 43. 20. 1. 40-42 as translated in E F Ware (note 3 above) §183.

[50] Ulpian D.43.12.1.1 'A river is distinguished from a brook, either by its size or the opinions of those living along it' as discussed in E F Ware (note 3 above) 17.

[51] D. 12.1.1 (*Flumen a rivo magnitudin ediscernendum est aut existimatione circumcolentium*) as discussed in *Butgereit and Another v Transvaal Canoe Union and Another* 86.

[52] The court here relied on D. 43.13.1.2 (*Pertinet autem ad flumina publica, sive navigabilia sunt sive non sunt*) stating that this interdict prevented activities that altered the flow of water in rivers during the summer months, irrespective of their navigability. See *Butgereit and Another v Transvaal Canoe Union and Another* 87. See also *Van Niekerk and Union State (Minister of Lands) Appellants v Carter Respondent* 1917 AD 359 at 373, where the court held that 'Roman law drew no distinction in principle between navigable and non-navigable rivers, though they were in some respects separately dealt with by the Praetors' Edicts.'

[53] Ulpian D. 43. 13. 1. 1. read with D. 43. 13. 1. 2., which stated in particular that 'the interdict pertains to public rivers, whether they are navigable or not' as discussed in E F Ware (note 3 above) § 44 and 45.

however, was able to regulate its use and prevent water from being used in a manner that affected the navigability thereof.[54]

While navigability may not have been a prerequisite for the classification of water as *res publicae,* one of the primary focuses of the texts in the context of rivers was to ensure that public rivers remained navigable and that their courses were not altered by human interference.[55] Furthermore, emphasis was placed on ensuring that neighbouring interests were not harmed.[56] Thus, the motivations for water law in Rome appear to be twofold: regulating and ensuring the commercial use of water particularly in terms of navigability as well as access; and regulating relationships between the users of water.

While ownership of smaller water sources was possible, it is unknown whether this was because of the size, navigability or seasonality of the rivers.[57] For example, some of the interpretations of the Roman law text provide that rivulets were private and some authors suggest that actual rivers were also private 'at least in earlier classical law'.[58] On the requirement that water be perennial in nature, very few rivers in South Africa would be considered to be public in character.[59]

In addition, whether ownership of these water sources was possible and how such ownership would operate was not clearly defined. It would appear that *res universitatis* was the least controversial of the three forms, as small communities

[54] Labeo D. 39.3.10.2 (*Si flumen* navigabile *sit, non oportere praetorem concedere ductionem ex eo fieri Labeo ait, quae flumen minus navigabile efficiat, idemque est et si per hoc aliud flumen fiat navigabile*) *Butgereit and Another v Transvaal Canoe Union and Another* 87. Ulpian *D* 39.3.19.2 and Pomponius *D* 43.12.2 as cited in *Transvaal Canoe Union and Another v Butgereit and Another* [1986] 4 All SA 472 (T) 475. See also Ulpian D. 43. 12. 1. 12. 'Not everything done in a public river or on its banks does the Praetor's interdict prohibit, but only that which makes the navigation or the landing worse. The interdict therefore applies only to navigable rivers and does not concern others' as discussed in E F Ware (note 3 above) § 26.

[55] The Praetor's Interdict D. 43. 12. 1., Ulpian D 43. 12. 1. 12., Ulpian D. 43. 12. 1. 15., Ulpian D. 39. 3. 10.2., Labeo D 43. 12. 1. 18., Praetor D. 43. 12. 1. 19., Ulpian D. 43. 12. 1 21.,Pomponius D. 43. 12. 2., as translated by E F Ware (note 3 above) § 16, 26, 29, 30, 33, 34, 36, 38 respectively.

[56] See, for example, Pomponius D. 43. 20. 3. 1. and Ulpian D. 43. 13. 1. 2. , D. 43. 13. 1. 4. as translated by E F Ware (note 3 above) § 39, 44 and 47 respectively.

[57] A M Prichard (note 19 above) 154; *Van Heerden v Wiese* (1880-1884) Buch AC 5 8.

[58] W Buckland (note 21 above) 183; Brugi *St Bonfante*1, 361; 43.12.1.4.

[59] *Van Niekerk and Union State Minister of Lands v Carter* 1917 AD; A Watson *The Evolution of Western Private Law* (2003).

(or corporations of a public nature) could own these resources.[60] For example, the municipality would own the theatres and racehorses. By comparison, there is no certainty from the sources or their subsequent texts as to whether *res publicae* were owned by the state or the people. Some sources suggest that public property was owned by the people,[61] whereas, other texts provide that this ownership vested instead in the state.[62] In terms of Roman law, Justinian defines *res publicae* to be the property of the state, which implies ownership.[63] However, Gaius states that public things cannot be owned by anyone, and instead are owned by the community.[64] This idea of the community (with reference to the people of the nation) owning the particular thing is repeated in the sources.[65] This is as compared to common property, which ostensibly belonged to no one.[66]

2.1.2. Property Law Classifications Under Roman-Dutch Law

Justinian's distinctions between *res communes*, *res publicae* and *res universitatis* were carried through to Roman-Dutch law, including their inconsistencies.[67] In

[60] E van der Schyff 'The concept of public trusteeship as embedded in the National Water Act, 1998' (2011) *Water Research Commission* 2.

[61] W Hunter (note 38 above) 65.

[62] F Schulz (note 35 above) 340 – 341 further distinguishes between types of things owned within the category of *res publicae.* For example, 'public places, streets, and buildings situated within a *municipium*' (that is, a municipal area) were owned by the *municipes* (directly translated as citizen). By contrast, these same things, such as public places, streets and theatres, were owned by the Roman State when not owned by the *municipes.* A Watson (note 27 above) 10; J A C Thomas (note 17 above) 75. For example, League's work on Gaius and Justinian at 122 states that *res publicae* was the property of the state, although

> 'originally everything belonging to the populus Romanus was 'res publicae' and extra commercium, but in Justinian's time only such State property as *directly* benefited the community, as in the instances given in the text, was *extra commercium* ; *e.g.* public slaves, though they belonged to the State, were *in commercio*' (see fn 2).

[63] W Buckland (note 21 above) 183; E van der Schyff (note 60 above) 22 – 23.

[64] The exact phrase is as follows: 'Such things as are subjects of human law are either public or private. Things that are public are held to be no man's property, they are in fact regarded as belonging to the whole community'- C H Monro (note 36 above) 39.

[65] T Sanders *The Institutes of Justinian* (1962) 91; E van der Schyff (note 60 above) 23.

[66] Cf E van der Schyff (note 34 above) 92; J Glazewski (note 9 above) 16-10 who states that *res communes omnium* entailed ownership by the state.

[67] This confusion appears to also have made its way to the United States of America. Trelease, in a discussion on American law, equates state ownership with public ownership of the water resources

Roman-Dutch law examples of *res communes* included 'running water which keeps a continuous flow' as well as the sea and air,[68] and the seashore in certain circumstances.[69] Huber stated that public things either belonged to the state (that is, *res publicae*) or to a community (that is *res universitatis*).[70] Public things included rivers, roads and harbours and specific emphasis was placed on their use for fishing and travel.[71] The text stated specifically that these were the 'peculiar property of the state'.[72] Huber's definition consequently entailed *res publicae* amounting to state ownership of the resource, with only public use thereof.

Grotius treated *res communes* as the property of all men, therefore requiring ownership by everyone as opposed to ownership by no one.[73] By contrast, *res publicae* and *res universitatis* were owned by 'certain large societies of men':[74] *res publicae* were owned by the state, whereas *res universitatis* were owned by a smaller society.[75] Grotius provided that that all rivers, lakes and other navigable waters, as well as their beds, shores and banks belong to the united states of Holland and West-Vriesland.[76] This confirmed state ownership of free-flowing

in the context of *res publicae*. In the western regions of the United States of America, the different legislative texts all differ as to 'who is the owner and what it owned'. The problem following from this uncertainty is that the courts have in some instances interpreted the legislation to mean state ownership, and in other instances, public ownership. As Trelease states, 'if real differences were intended by the framers of these varying statements, the courts have failed to find them and have blurred the distinctions'. See in this regard F J Trelease 'State ownership and trusteeship of water' 45 *California Law Review* 638 (1957) 642.

[68] Inst. 2. 1. 1; Dig. 1. 8. 2; A J Foord *Van Leeuwen's Censura Forensis* (1884) 8.; R W Lee *An Introduction to Roman-Dutch Law* 5ed (1953) 123.

[69] *Staet oock te weten dat het zand van de zee eende overzulcks oock het strand, voor zoo veel het den meesten tijd ofte ter halver vloed met de zee bedect werd, is van ghelijck recht als de zee: maer het bloote strand komt het volck van't land toe.* R W Lee *The Jurisprudence of Holland by Grotius* Vol I (1926) 66 - 67; R W Lee (note 68 above) 123.

[70] U Huber (translated by P Gane) *The Jurisprudence of My Time*Vol I (1939) 116. Huber stated that *res publicae* could either be used exclusively by the state (for example, tolls, taxes and national funds), or used by the general public.

[71] U Huber (note 70 above) 116.

[72] U Huber (note 70 above) 116.

[73] A F S Maasdorp *The Introduction to Dutch Jurisprudence* (1878) 62. See also E van der Schyff (note 60 above) 26 – 27.

[74] A F S Maasdorp (note 73 above) 62.

[75] A F S Maasdorp (note 73 above) 63.

[76] R W Lee (note 69 above) 68 – 69; A F S Maasdorp (note 73 above) 63.

water and lakes within the boundaries of that area.[77] The difficulty with ascribing the notion of ownership or dominium to the state is that the 'sovereign state is by hypothesis in subjection to no superior'.[78] Grotius, however, stated that the state's role was administrative in nature, that is, to permit 'strangers' the use of the rivers and impose tolls and other charges for the conservation of this water.[79]

Voet highlighted the confusion between public and common property among the various authors.[80] He noted that Gaius, Justinian and Marcianus contradicted each other in their examples and explanations of things common or public.[81] He further stated the following of the distinction between common and private property:[82]

> As for public things, that is to say those which belong by right to ownership to the whole people, they are to be distinguished from things common by the law of nations. Public things have already been taken by the people and have begun to be in their ownership; not so common things, which have still to be taken, as belonging to nobody... In these public things are classed perennial rivers... Since the use of these things is common, like that of public roads, shores and riverbanks, it is free therefore to anyone to sail and fish in them.

Thus Voet clearly differentiated between common things, which are not owned, and public things, which are owned by the 'whole people'. While this does not necessarily confirm that *res publicae* belonged to the people, it is more likely on the basis of this text, that *res publicae* belonged to the people than the state.

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[77] R W Lee (note 69 above) 68 – 69; A F S Maasdorp *The Introduction to Dutch Jurisprudence* (1903) 43.

[78] E Poste (note 10 above) 153.

[79] *De gantsche burgerlicke gemeenschap van Holland ende West-Vrieslandt komen toe de stromen, als den Rijn, de Wael (die men oock de Merwe noemt) de Maes, de Yssel, de Leck, voor soo veel die loopen binnen de palen van Holland. Insgelijcx de meren en andere bavarebare wateren, oock den grond van alle de voorsz stromen ende wateren, met den oever voor soo veel die met het water den meesten tijd werd bedect. Over sulcx heft het land van Holland ende West-Vriesland recht om over de bewaringhe van de selve stromen, tollen ende andere ongelden op tesetten, alsoo de vremden 't ghebruick van de selve stromen hebben by 's lands toelatinge.* R W Lee (note 69 above) 68-69. W Hunter (note 38 above) 66.

[80] J Voet (translated by P Gane) *The Selective Voet Being the Commentary on the Pandects* Vol I (1955) 153 – 154.

[81] Some contradictions can be found at D. I, 8, 1 pr at end; with D. L. 16, 16; Inst. 2, 1 in pr. And sec. 1; D. I, 8, 2; D. XLIII, 8, 3, 1; D. 1, 8, 10; Inst. 2, 1, 5. J Voet (note 80 above) 153 – 154.

[82] Inst. 2.1.10, D. XLVIII 6 -7; J Voet (note 80 above) 158. Also discussed in *Transvaal Canoe Union and Another v Butgereit and Another* [1986] 4 All SA 472 (T) 475.

Under Roman-Dutch law, harbours belonged to the *regalia* and as a result the right to fish had to be granted by the *princeps*.[83] Voet stated that public rivers had also come to belong to the *regalia*, and subject to limitations imposed by the authorities,[84] these public rivers were capable of use by the public, including the right to sail and fish.[85] Similarly, use of the river was dependent on authorisation from the relevant persons and provided it did not affect navigability of the river.[86] In this respect, the praetor could grant a preventative interdict to cease any activity that affected the navigability of a public river.[87] A beneficial interdict could also be awarded to a 'tax-farmer' prevented from fishing, and to stop force from being used to prevent cattle from being driven to a public river or a bank thereof.[88] Consequently, the nature of the state's duties was administrative.

The precise difference between common and public property is therefore difficult to discern given the overlap of the distinctions made between water resources. For example, flowing water is classified as *res communes* while perennially flowing rivers are considered to be *res publicae.* The question that arises is whether a principled basis exists to justify classification of different resources.

It may be possible to justify this difference by looking to the intended beneficiary of the resource.[89] Where one is looking at the nature of a thing classified as *res*

[83] Groenewegen *De Legibus Abrogatis* on Justinian's *Institutiones* 2.1.2 in *Butgereit and Another v Transvaal Canoe Union and Another* 88.

[84] Voet, *Commentarius* 41.1.6 citing lib. 2. tit. 56 of the *Libri Feudorum* as appears in *Butgereit and Another v Transvaal Canoe Union and Another* 88. See also Feuds, bk. 2, ch. 56 as discussed in *Van Niekerk and Union State (Minister of Lands) Appellants v Carter Respondent* 1917 AD 359 at 373.

[85] In this respect, *Butgereit and Another v Transvaal Canoe Union and Another* [1988] 2 All SA 84 (A) 89 discusses Bort *Tractaet van de Domeynen van Hollandt V*. 2, De Groot, *Inleidinge* 2.1.26 and 2.1.28, Voet 41.1.6, Vinnius *ad Inst*. 2.1.2, Heineccius, *Elementa Juris Civilis*, 2.1 (para. 325).

[86] J Voet (note 80 above) 476 as cited in *Transvaal Canoe Union and Another v Butgereit and Another* 475. This position under Roman-Dutch law has been confirmed by the Appellate Division - see *Butgereit and Another v Transvaal Canoe Union and Another* 89.

[87] J Voet (note 80 above) 476 as cited in *Transvaal Canoe Union and Another v Butgereit and Another* 475.

[88] J Voet (note 80 above) 481 as cited in *Transvaal Canoe Union and Another v Butgereit and Another* 475.

[89] J T Abdy and Bryan Walker (note 14 above) 71; J A C Thomas (note 17 above) 65. This suggestion finds support in E van der Schyff (note 60 above) 24 – 25.

communes the resource will be common to 'all the world'. By contrast, *res publicae* will be common to all the members of a state.[90] In the context of *res universitatis,* the beneficiary of the public use is a smaller community. The distinction, therefore, appears to be a geographic one. Where the resource is designated along universal or global lines it is considered to belong to all whereas a resource capable of being bounded within a state is seen as belonging to the members within that state. For example, flowing water cannot be contained and in the context of South Africa, will flow downstream to other countries. Consequently, it is treated as *res communes* and belonging to no one. However, the water in a particular river at a particular place in South Africa will be treated as *res publicae.* While the water in the river cannot be contained or prevented from flowing, access to and use of the water at that particular site is possible. Further, Van der Schyff argues that *res publicae* were in theory capable of ownership, but were 'reserved through the positive law for the benefit and general use by the citizens'.[91]

As Lee so aptly puts it: 'all this is very confused. The distinction between things common and things public is ill-defined, and has no practical value'.[92] Given the overlap and lack of clarity as to the exact scope and nature of public and common property, it would seem that these distinctions were not significant to the social and legal issues of the time. This, too, may be the case today. Consequently, it is necessary to investigate the modern approach to these classifications to ascertain whether they are of any value. In order to do so, the case law in South Africa considering these classifications will be discussed. To reiterate, the purpose of this analysis is to investigate whether these classifications facilitate a more meaningful understanding of trusteeship.

[90] J T Abdy and Bryan Walker (note 14 above) 71.

[91] E van der Schyff (note 60 above) 25.

[92] *The Institutes of Justinian* Book II The Law of Property § 146; R W Lee (note 10 above) 35, 43. See also E van der Schyff (note 60 above) 20, who also notes the confusion in the historical sources.

2.2. Classification of Water as Property in South African Case Law

The courts have had occasion to discuss the meaning and extent of *res publicae* and *res communes* in South Africa. What will be shown from these cases is the extent to which South African law has extended and developed Roman and Roman-Dutch law to accommodate contemporary South African circumstances.

In 1917, the court appreciated the necessity for Roman and Roman-Dutch law to be brought in line with modern requirements. Even prior to the drastic changes made by the Constitution and the National Water Act, which completely revised the nature of the relationship between water resources and the state, the court held the following:[93]

> The elasticity of the civil and the Roman-Dutch systems has enabled South African Courts to develop our law of water rights along lines specially suited to the requirements of the country. The result has been a body of judicial decisions, which, though eminently favourable to our local circumstances, could hardly be reconciled in its entirety with the law either of Holland or Rome.

Two cases that specifically discussed *res publicae* in South Africa are the *Transvaal Canoe Union and Another v Butgereit and Another*[94] and the consequent appeal of this decision, namely *Butgereit and Another v Transvaal Canoe Union and Another*.[95] These cases were heard before the introduction of the Constitution and the National Water Act, and thus applied principles consistent with the previous regime of water management.[96] The court's dictum with reference to *res publicae* is, nevertheless, relevant insofar as it discusses the traditional classifications in detail.

In the court of first instance, the applicant called upon the court to consider whether the Crocodile River fell to be classified as a *res publica*.[97] The applicant,

[93] *Van Niekerk and Union State Minister of Lands v Carter* 1917 AD 359.

[94] [1986] 4 All SA 472 (T) 475

[95] [1988] 2 All SA 84 (A) 86.

[96] The cases were heard in 1986 and 1988 respectively.

[97] 474.

the Transvaal Canoe Union, sought the right to canoe on the Crocodile River across an owner's section of the riverbed.[98] The first respondent owned the portion of the riverbed up to the midsection of the river, in accordance with the rights of a riparian landowner. To prevent canoeists from accessing this portion of the river, the respondent had taken drastic measures, going so far as to put up an electric fence in the middle of the river and firing rubber bullets at 'offending' canoeists.[99]

If the applicants were successful, the classification of the river as a *res publica* would afford them the right to access the river for recreational purposes. The respondent and owner of this portion of the riverbed argued against this classification on the basis that the river was not navigable, which, they contended, was a prerequisite for the classification of a river as *res publica*.[100]

The court, in addressing the arguments put forward by the respondent, dealt with the requirements for the classification of a river as a *res publica.* The first requirement was that the river had to be perennial. However, the respondents did not object to the applicant's contention that the river be classed as perennial, nor did the court find that there was insufficient water in the river for this not to be the case.[101] The court held further that even if a river dried up in times of drought, it could still be classified as perennial, consistent with the Roman and Roman-Dutch law sources.[102]

The second requirement the court investigated was whether it was necessary for the river to be navigable, highlighting the importance of navigability in Roman and Roman-Dutch law. However, the court reiterated the dictum of Innes CJ in *Van Niekerk and Union State Minister of Lands v Carter*:[103]

[98] 472.

[99] 472.

[100] 474.

[101] 474.

[102] 474 citing also D 43.12.1.2 and 3, and *Van Niekerk and Union State (Minister of Lands) v Carter* 1917 AD 359 at 372.

[103] 1917 AD 359 at 477.

> …the definition of a public stream has been extended far beyond its original limits. And the legislature has set its seal upon the work of the Courts. Every stream is now public, the water of which is capable of being applied to common riparian use, no matter how frequently it may run dry. The Union, therefore, though practically without navigable rivers, is covered with a network of public streams, the majority of quite small size.

The court concluded that South Africa did not require rivers to be navigable to the same extent required by Roman and Roman-Dutch law.[104] As a result, the perenniality and navigability of the river did not avail the applicants in this case. Consequently, the river was a *res publica* and the canoeists were entitled to access the portion of the river belonging to the respondent.[105]

In the appeal, the appellant argued that while the river was perennial, it was not a river (or *flumen)* but rather a rivulet or stream, and as such, should be classified as private water.[106] The appellants further contended that the court a quo erred in its findings on navigability, as it had not considered whether or not the river was navigable for commercial reasons.[107] This, they argued, was necessary for the classification of water as *res publicae.*[108] Consequently, none of the rivers in South Africa, save perhaps the Buffalo River, could be classified as *res publicae*, as none of them were capable of navigation for commercial purposes.[109]

The court, however, disagreed with these assertions. With regard to the size of the Crocodile River, the court dismissed the argument that it was too small to be classified as a river.[110] Further, on consideration of the sources, it held that the navigability of a river did not influence its public character and was not a consideration in terms of Roman and Roman-Dutch law, but rather a factor in the use of water and the restrictions imposed thereon.[111] Accordingly, the appeal

[104] 477.

[105] 478.

[106] 84.

[107] 84.

[108] 85.

[109] 85.

[110] 89.

[111] 87 and 90.

failed and the Appellate Division confirmed the rights of the canoeists to use the Crocodile River for recreational purposes. The principles of relevance from this case, therefore, are that navigability of a river was not a precondition for water to be classified as *res publicae*, nor was the size or occasional drying up of the river.

The Supreme Court of Appeal was afforded an opportunity to engage with these classifications in the context of the Constitution and the National Water Act in *Mostert Snr and another v S.*[112] A farmer and his son had intentionally failed to register a second pump, as required by the Lomati Irrigation Board.[113] In addition, they had tampered with the existing pump station meter to reflect a lower than actual water usage.[114] This resulted in charges of theft, fraud and further criminal charges for contravention of section 151 (1)(e) and (5) of the National Water Act for unlawfully, intentionally or negligently tampering or interfering with the required pump and unlawfully, intentionally or negligently committing an act detrimentally affecting a water resource by illegally abstracting water from the Lomati River.[115]

The court a quo held that common law charges could not be brought by the state, as the statutory penalties necessarily excluded common law remedies.[116] However, on appeal, the Supreme Court of Appeal disagreed and found that the Act had not specifically excluded common law offences.[117] Consequently, the court sought to establish whether the water contained in the Lomati River was of a public or a private character, to establish whether it was capable of theft in terms of the common law.

The court made two important rulings in the context of both the classifications of things, as discussed above, and trusteeship. While failing to provide a thorough exposition of Roman and Roman-Dutch law to come to a conclusion (as

[112] [2010] 2 All SA 482 (SCA)

[113] Para 3 and 4.

[114] Para 3.

[115] Para 6.

[116] Para 18.

[117] Para 20.

undertaken in the *Butgereit* cases), the court concluded that public water, whether running in a river or stream, is classified as *res communes* in terms of the sources. Specifically, the court states:[118]

> Roman law recognized certain things as being *res extra patrimonium* which were incapable of being owned, including those things classified as *res communes* being 'things of common enjoyment, available to all living persons by virtue of their existence'. Public water, running in a river or a stream, was recognized as being *res communes* and therefore incapable of being owned. These Roman law principles were adopted by Roman-Dutch law and subsequently recognized in South Africa.

The court thus concludes that the water contained in rivers is *res communes* and therefore incapable of ownership.[119] If it is not owned, then, logically, it cannot be stolen.[120]

The state contended that the National Water Act completely changed the legal regime with the introduction of the idea of trusteeship, with the effect that the state owned water.[121] However, the court concluded that trusteeship vested nothing more in the state than the requirement to administer and control water.[122] The court further observed that public water was already controlled and administered by the state under the previous water regime.[123] As a result, the nature of the state's role in relation to the water users had not changed. While the Act is silent in respect of the ownership of water, giving rise to a difficulty as to whether water remains unowned, or is owned by the state or the public, the court emphatically stated that the state did not own water resources. The court specifically stated that this water, being *res communes*, is incapable of ownership, consequently ending the debate as to whether ownership of water is possible.

[118] Para 22.

[119] Para 23.

[120] Para 23. See also E van der Schyff and T 'Is water flowing in a public river or stream 'a thing capable of being stolen'?' (2012) 2 *SACJ* 297.

[121] Para 23.

[122] Para 23.

[123] Para 23.

However, it is possible that the common law classifications pertaining to ownership of private water persist in some limited circumstances, such as in relation to water contained in brooks or small streams, flowing over an owner's land. Given that the Water Act specifically regulates the management and administration of water only, the common law classifications pertaining to ownership of water may have survived this regulatory change. In this respect, however, the ownership would be "bare" or "nude" dominium of the resource, as all the use and entitlements to the resource are heavily regulated by the statutory framework.[124] As a result, private ownership of water in this regard would have very little practical value. The antithesis to this argument is that the Water Act specifically aims to redress the injustices and inequalities caused by the exclusion of access to resources as a result of land ownership patterns. As a result, there may be a philosophical justification for abandoning any argument or interpretation of the legal framework which allows for the possibility of any ownership of any type of water.

This judgment can be criticised for failing to properly analyse the distinctions made between *res publicae* and *res communes*, as discussed above. It is also clearly wrong in respect of the dictum contained in the *Butgereit* cases, as 'public water, running in a river or a stream' is correctly classified as *res publicae* and not *res communes*. Had the court correctly found that this type of water was *res publicae* it may have been required to engage with the nature of ownership of water and whether it was owned by the public or the state.

Burchell states that neither *res publicae* nor *res communes* is capable of theft as they are *res extra commercium*.[125] This is based on the statement by the court in *R v Laubscher*[126] that 'public water … cannot be taken into private ownership'.[127] However, Van der Schyff and Van der Walt argue convincingly that water as *res publicae* is owned by the state, and given its importance in the modern context,

[124] See, in particular, H Mostert and A Pope (eds) *The Principles of the Law of Property in South Africa* (2010) 92 – 94.

[125] J Burchell *Principles of Criminal Law* 3ed (2005) 789.

[126] 1948 (2) SA 793 (C) 794.

[127] 794.

should be regarded as *in commercio.*[128] Their conclusion is that water, if correctly classified as *res publicae*, should be regarded as a thing capable of theft. Such an amendment of the common law would be consistent with section 39 of the Constitution, which requires that the 'spirit, purport and objects of the Bill of Rights should be promoted'.[129]

The court also fails to take account of the decisions in the *Butgereit* cases, despite the in-depth analyses that these decisions offer. The reasoning of the court is disappointing, to the extent that it does not provide any further clarity on the confusion that exists in the context of *res publicae* and *res communes.* That said, the court did note that factually the state would not have succeeded in proving a charge of theft, regardless of its finding.[130]

Despite the shortcomings of this decision, this judgment was handed down by the Supreme Court of Appeal in respect of the contemporary legal framework dealing with water. It very clearly states that public water, whether running in a stream or a river, is to be treated as *res communes.* The fact that it is historically inaccurate does not mean that it is not binding. Consequently, public water in terms of South Africa's apex court[131] is to be treated as *res communes*. Given that the distinction between public and private water has been done away with, and all water now forms part of the same hydrological cycle (which is considered public), it is argued that all water should be classified as *res communes*. The motivation for this assertion is dealt with below.

2.3. A Critique of Proprietary Classifications in Contemporary Water Law

It is argued that the finding of the Supreme Court of Appeal in the *Mostert* decision, that is, that water is *res communes*, is applicable to all water. The impact

[128] E van der Schyff and T van der Walt 'Is water flowing in a public river or stream 'a thing capable of being stolen'?' (2012) 2 *SACJ* 300 -306.

[129] See Chap 3 (note 159 above).

[130] Para 24.

[131] To the extent that this was not argued as a constitutional matter.

of such a development would mean that water is incapable of ownership. However, if water is still capable of being divided into both *res communes* and *res publicae*, water may be owned by the state (or the public) in terms of the latter classification. It is therefore necessary to evaluate whether these classifications are of any practical significance in affording rights to parties in respect of the access, use and protection of the resource. The question is whether these classifications provide any further content to trusteeship.

The Roman and Roman-Dutch law requirement for the classification of water as *res publicae* was that the river had to flow perennially. As has been stated above, *res publicae* entailed public property that was susceptible to use by all. As a result, this classification largely afforded access to the resource. It is clear that the state still regulated the use of the resource, especially in the context of navigable waters, where extraction of water was subject to limitations. In the context of perennial waters, these requirements are consistent with the trusteeship clause contained in the Act, as the state is required to facilitate access to water resources.[132] Access to water resources via river banks is a separate issue and is not in dispute in the context of this thesis. It is apparent that the underlying motivations for the rules regulating *res publicae* in both Roman and Roman-Dutch law were to ensure that the navigability of rivers was not interfered with, access to water resources remained open, and relationships between water users in this respect were regulated.

In the context of the legislative framework, the National Water Act in particular sets out, in precise detail, the administrative requirements of water management. The use of water is regulated by the Act, and the state has the authority to control all aspects of water use.[133] The Act requires that all persons must have access to water and mechanisms are put in place to ensure the beneficial and equitable distribution of water resources.[134] The legislation goes further than the requirements of *res publicae* by implementing a number of legislative

[132] S 4 and 21(k) read with sched 1(e).

[133] Ch 3 (note 221 above).

[134] Ch 5 (note 124 below).

requirements aimed at the protection and preservation of the resource.[135] In addition, the use of water for recreational purposes is specifically provided for by the Act.[136] Equal access to resources, environmental protection and sustainable development were not features of *res publicae* and the goals of trusteeship therefore require much more of the modern state.

All water in terms of the Act is viewed as part of one hydrological cycle and is not differentiated in terms of whether the river is perennial, navigable (for commercial purposes, or otherwise), or a stream or other water source.[137] Instead, all water must be allocated beneficially and equitably, and all water falls within the control of the National Government as trustee.[138] The definition of water resources in the Act includes surface water, which ostensibly includes water contained in brooks and streams.[139] All water is public property and subject to administrative control by the state, in terms of the trusteeship provision. This is compared to Roman and Roman-Dutch law, which clearly only held that certain types of rivers were classified as *res publicae*, namely perennial rivers and streams.[140] As stated above, very few rivers would be found to be of public character in South Africa, if the requirements of perenniality were to be applied.[141] However, as the court stated in *Van Niekerk*, the content of *res publicae* is capable of evolving to be consistent with modern requirements.[142] Consequently, it may be possible to hold that this concept has evolved to the point where all water is classified as *res publicae* in order to be consistent with the constitutional requirements.

The stumbling block in this respect is the court's decision in *Mostert Snr and another v S*, which held that public water as found in rivers and streams is

[135] Ch 5 (note 5 below).

[136] S 4 and 21(k) read with sched 1(e).

[137] Ch 2 (note 222 above).

[138] S 3(1) and 3(2) of the Water Act.

[139] S 1 of the Water Act.

[140] See note 59 above.

[141] See note 59 above.

[142] See note 59 above.

classified as *res communes.*[143] It is the assertion of this thesis that the court did not thoroughly engage with the traditional classifications, and it is possible that this decision may be set aside in the future.[144] This decision is, however, irreconcilable with the proposition that water in rivers is classified as *res publicae*. It is hard to distinguish between these cases, as both dealt with the use of water resources, despite the fact that *Butgereit* was concerned with the use of water for recreational purposes while the *Mostert* case was concerned with the use of water for commercial purposes. The distinction between use of water for recreational purposes and use of water for commercial purposes was not a requirement of Roman or Roman-Dutch law, and both uses were treated within the category of *res publicae.*

In terms of the traditional classifications, therefore, water should be classified as *res communes*, in the context of running water, and *res publicae*, in the context of perennial rivers. However, this separation is no longer possible in terms of the Supreme Court of Appeal's decision, given that the Lomati River (which is the subject of the judgment) is perennial in nature. Instead, all water must be classified as *res communes* consistent with the court's finding.[145] This is clearly inconsistent with the traditional classifications.

While the court could potentially have failed to engage properly with the sources in the *Mostert* case, it is possible that its decision is nevertheless the better decision. *Res communes* has as its basis an understanding that some resources are so important as to be incapable of ownership by anyone.[146] If one analyses the shift in doctrinal views of the environment and natural resources, the approach to water as a resource today comprises a more global approach.[147] For example, the principle of inter-generational equity requires planning into the future for

[143] See note 118 above.

[144] See note 131 above.

[145] See note 118 above.

[146] See note 10 above; M Habdas (note 31 above) 628.

[147] E Van der Schyff (note 34 above) 105 – 106.

inhabitants of the planet that do not yet exist.[148] The understanding of the hydrological cycle as a unitary feature that cannot be bounded also shows an appreciation of water as a global resource, common to all, rather than a municipal or state-owned resource.[149]

By contrast, *res publicae* aims to regulate types of property that serve an economic function, such as roads, harbours and highways.[150] As stated by Hadbas, goods such as military walls (and roads) 'could be the object of private ownership, [but] it was accepted that risks of inefficient management, insufficient financing and inadequate communication were too great to allow private individuals to own such immovable property'.[151] As a result, the classification of *res publicae* served a very different function to the classification of *res communes.*

When evaluating any natural resource in property law, particularly a finite one, this must be undertaken in the social and legal context of modern law, which is markedly different to Roman and Roman-Dutch law. South Africa is guided by the Constitution, and this has to be the primary source of protection for natural resources and the promotion of human rights.[152] The societal requirements of property law, as well as the need for consonance between private property and modern day practice, will shape the future content of property law.[153] This quote, written almost four decades ago, accurately reflects this sentiment:[154]

> Fundamental remains the belief that the law is neither occult, arcane nor oracular but to the contrary dedicated to the rational solution of social conflicts through the legal process; that because law is only a means, not an end, it falls to be adjudged not by any internal standard peculiar to it as a closed system, but by the degree to which it furthers relevant social ends…

[148] See Ch 5 (note 137 below).

[149] Ch 2 (note 222 above); E van der Schyff 'Stewardship doctrines of public trust: Has the eagle of public trust landed on South African soil? (2013) 130 *South African Law Journal* 385.

[150] M Habdas (note 31 above) 629.

[151] M Habdas (note 31 above) 629.

[152] Ch 3 (note 17 above).

[153] P J Badenhorst, J M Pienaar and H Mostert (note 10 above) 93; E van der Schyff (note 149 above) 387.

[154] H R Hahlo and E Kahn *The South African Legal System and Its Background* (1973) 594.

Given the Supreme Court of Appeal's finding in the *Mostert* case that water contained in a river is to be treated as *res communes*, and given the paradigm shift in the approach to natural resources, this thesis has advanced the argument that water may very well be more appropriately classified today as *res communes.* This would more accurately reflect the social *mores* of the modern South African constitutional state and the importance of water to society. The inherent problem with this argument is that *res communes* cannot be considered *res in commercio,* under any circumstances, which would preclude a finding that water is capable of theft in terms of the common law.[155] However, the statutory framework is capable of remedying this shortcoming by expressly providing for the theft of public water.

2.4. Shortcomings of Common Law in Conceptualising the Statutory Notion of Trusteeship

South African law provides authority for water to be treated as both *res publicae* and *res communes.*[156] Both lines of cases on the subject, discussed above, dealt with the use of the resource and both dealt with perennial rivers.[157] The difference is that the *Butgereit* cases were decided prior to the reform of water law, while the *Mostert* case was decided under the new constitutional and legislative regime.

The question must then be asked as to whether it is more suitable to modern South African law and the needs of a constitutional society for water to be classified as *res publicae* or *res communes*? Water is no longer capable of being privately owned in terms of the Act and is comprehensively regulated as a public resource by the Act.[158] For example, the Act expressly allows for the recreational use of rivers and, had the incidents that transpired in the *Butgereit* cases taken place after 1998, the matter would never have made it to court. The use of water is heavily regulated by the Act and the classification of water as *res publicae* will not afford

[155] See above (note 128).

[156] See discussion above at note 93.

[157] Both cases were, however, heard at the Appellate level.

[158] See Ch 3 (note 211 above).

complainants any more remedies than already exist in terms of this legislation, whether the cause of action is founded in constitutional or statutory law. In addition, some of the Roman remedies may be entirely inappropriate, if not unconstitutional, in modern South Africa.[159]

However, the one instance where the Roman and Roman-Dutch law classifications may have assisted in providing modern day remedies is in the context of theft of water resources, as was in issue in the *Mostert* case. Had the court concluded that water was *res publicae*, an opportunity may have arisen for it to engage with whether water was either owned by the state or the public, as entailed by *res publicae*. Further, this may have provided the opportunity for the court to consider whether the common law crime of theft should be extended to the category of *res publicae,* as argued by Van der Schyff and Van der Walt.[160] Thus, ironically, the only instance in modern law where these classifications may have been of assistance in protecting water resources was not fully investigated by the courts.[161]

Aside from this, it must be appreciated that in the context of the use of and access to water resources, as well as the protection and preservation thereof, these classifications do not further the legislative requirements. The legal framework not only caters for the modern requirements of water use, but goes beyond that which is contained in the classifications of *res publicae* and *res communes.* This notwithstanding, the huge losses of water per annum as a result of theft must be addressed by legislative amendments to remedy this situation, given the court's findings in the *Mostert* case.[162]

[159] For example, the Praetor could hand out a life sentence to 'those who for the irrigation of fields or the beautification of gardens consume the water through furtive channels'. The Emperors Arcadius and Honorius to Asterius, Count of the East (Nov. A. D. 397.) C. 11. 42. 4. as translated in E F Ware (note 3 above) §253.

[160] See above at note 119.

[161] They were, however, found guilty of fraud (para 30), as well as wrongfully and intentionally tampering with a WAMS device (para 31) and unlawfully abstracting water from the Lomati River (para 32).

[162] See Ch 5 below (note 251).

In the context of modern South African law, it is clear that all water is perceived within the context of the hydrological cycle.[163] It is no longer separated into different components, such as surface and groundwater. Instead, underground water, aquifers, surface water including rivers (whether navigable or non-navigable) and lakes are all protected as a single resource.[164] The legal framework attempts to cater for the fact that the use of water impacts not just a bounded portion thereof, but ultimately, the entire hydrological cycle. It also takes into account that water use affects not only downstream users in South Africa, but also users in other countries who share our water sources.[165] Consequently, there has been a shift in the perception of water as something that can be bounded or confined, to an appreciation of its fluid, unbounded nature. This shift in thinking must reflect in the way that we classify water according to the Roman and Roman-Dutch law classifications discussed above. Given that Roman and Roman-Dutch law distinguished between different types of water, it is problematic to classify water today in terms of *res publicae*, where the legislative intent is to treat water as one entity, which is free of the limitations and inherent inequalities that arise from land ownership.

In addition, the distinction between public and private water has been done away with and consequently, it is argued, that no water should be capable of private ownership. This is contrary to the Roman and Roman-Dutch position where, in terms of these classifications, most South African water would be deemed to be private water. As a result, the historical classifications are not suitable to the modern constitutional context.

3. Reliance on the Public Trust Doctrine: The Comparative Law Perspective

Given that trusteeship is not expressly defined by the National Water Act or the Water Services Act, its content must be derived from the constitutional and

[163] Ch 2 (note 222 above).

[164] Preamble to the National Water Act.

[165] Ch 3 (note 16).

legislative framework. The nature of the language used in section 3 of the National Water Act has persuaded several scholars to argue that the public trust doctrine forms the basis for trusteeship as introduced by the new legislative framework.[166] In the United States of America, which has arguably the most developed form of the doctrine,[167] it is a mechanism initially introduced by the judiciary in which water and other natural resources are prevented from being alienated by the state, and instead, this property is to be held in trust for the benefit of the people.[168] At its inception in American law, the public trust doctrine recognised that certain lands were so valuable to the public that they should be incapable of alienation to private parties.[169] In its most basic form, the doctrine historically only afforded a right of access to navigable waterways and submerged lands, with the purpose of furthering commerce, navigation and fishing.[170] In its original form, therefore, it mirrored the characteristics of *res publicae*.[171]

The use of terminology such as 'trusteeship' and 'public benefit' in the provisions of the Water Act and the Services Act shows a similarity with the requirements of

[166] E van der Schyff (note 149 above) 369; E Van der Schyff (note 4 above) 758; E van der Schyff 'Unpacking the public trust doctrine: a journey into foreign territory' (2010) 13 *PER / PELJ*; E Van der Schyff (note 34 above) 106 - 148; G J Pienaar and E van der Schyff 'The Reform of Water Rights in South Africa' (2008) 4 *The Journal for Transdisciplinary Research in Southern Africa* 1; generally E van der Schyff (note 60 above); M I Msibi and P Z Dlamini 'Water allocation reform in South Africa: History, processes and prospects for future implementation' (2011) *Report to the Water Research Commission* 18; E van der Schyff 'The concept of public trusteeship as embedded in the National Water Act, 1998' (2011) *Water Research Commission* 10; J Glazewski *Environmental Law in South Africa* 2ed (2005) 17; M Kidd *Environmental Law* 2ed (2011) 10 – 12; H Thompson (note 7 above) 279 – 280; L Ferris 'The public trust doctrine and liability for historic water pollution in South Africa' (2012) 8/1 *Law, Environment and Development Journal* 3.

[167] See also E van der Schyff (note 60 above) 13 – 16, who discusses the application of the public trust doctrine in a variety of jurisdictions around the globe.

[168] M S Benn 'Towards environmental entrepreneurship: restoring the public trust doctrine in New York' (2006) 155 *University of Pennsylvania Law Review* 203; G R Scott 'The expanding public trust doctrine: a warning to environmentalists and policy makers' (1998 – 1999) 10 *Fordham Environmental Law Journal* 15; L Ferris (note 166 above) 4.

[169] A B Klass 'Modern public trust principles: recognizing rights and integrating standards' (2006) 82 *Notre Dame L Rev* 699; E van der Schyff (note 166 above) 126.

[170] R J Lazarus 'Changing conceptions of property and sovereignty in natural resources: questioning the public trust doctrine' (1985-1986) 71 *Iowa L Rev* 710; H C Dunning 'The public trust: a fundamental doctrine of American property law' (1988-1989) 19 *Environmental Law* 519. E van der Schyff (note 166 above) 128.

[171] See note 11 above.

the public trust doctrine, especially as it operates in United States of America (hereafter referred to as 'America').[172] Other scholars have likened the operation of the public trust doctrine in America to the South African introduction of trusteeship.[173] The manner in which it has been interpreted and applied in America can provide a useful comparative platform for the approach in South Africa. The goal of this discussion is to ascertain the advantages and disadvantages of the doctrine. This will form the basis of the discussion in Chapter 7, where the South African legal framework will be measured against these advantages and disadvantages. Consequently, the purpose of this chapter is to discuss and evaluate the public trust doctrine as it functions in America.

It should be noted from the outset that, barring a few salient features, there is little agreement as to the origin, definition, nature and applicability of the doctrine.[174] On the one hand, the uncertainty and inconsistency of this doctrine has been widely criticised.[175] On the other hand, courts and academics have welcomed the flexibility of the doctrine and its ability to adapt to the changing needs of society.[176] These debates will be highlighted and discussed below.

3.1. Origins and Tenets of the Public Trust Doctrine

Academic commentary advances the proposition that the doctrine has its roots in the Roman law concepts of public and common property. [177] While Roman law is

[172] See generally E van der Schyff (note 166 above) 5.

[173] See J Glazewski (note 9 above) 1-24 – 1-25.

[174] G R Scott (note 168 above) 32; T P Brady 'But most of it belongs to those yet to be born:' the public trust doctrine, NEPA, and the stewardship ethic' (1989-1990) 17 *B.C. Envtl. Aff. L. Rev* 623; J P Power 'Reinvigorating natural resource damage actions through the public trust doctrine' (1995) 4 *NYU Environmental Law Journal* 420; R J Lazarus (note 170 above) 647.

[175] J P Power (note 174 above) 420; A B Klass (note 169 above) 699; R J Lazarus (note 170 above) 710 – 715; R Delgado 'Our better natures: a revisionist view of Joseph Sax's public trust theory of - environmental protection, and some dark thoughts on the possibility of law reform' (1991) 44 *Vand L. Rev.* 1211.

[176] J P Power (note 174 above) 420; A B Klass (note 169 above) 2 – 3; E van der Schyff (note 166 above) 125.

[177] Note 'The public trust in tidal areas' (1969) 79 *Yale L J* 764; J Sax *Defending the Environment* (1971) 163 – 164; P Deveney 'Title, jus publicum and the public trust: an historical analysis' (1976) 1 *Sea Grant Law Journal* 16; E van der Schyff (note 60 above) 10; L Ferris L Ferris (note 166 above) 5.

probably the most doctrinally pure form of the public trust, the discussions of the origins thereof in relation to the specific classification confuse *res publicae* and *res communes,* echoing the confusion experienced in South African law.[178] Sax, considered to be the father of the public trust doctrine,[179] has reiterated Lee's point as stated above, namely that the distinctions made between different types of common and public property were very confused.[180] Given that the doctrine was primarily concerned with affording the public rights of access to water in the context of navigation and fishing, the doctrine is probably better classified as *res publicae.*[181]

As with Roman law, the history and understanding of the origins of the doctrine in English law is problematic. Similar to Roman law, English law distinguished between *jus publicum* and *jus privatum,*[182] and the Crown held the former in trust

[178] See note 92 above. J L Sax 'The public trust doctrine in natural resource law: effective judicial intervention' (1970) 68 *Michigan Law Review* 475; L Bento 'Searching for intergenerational green solutions: the relevance of the public trust doctrine to environmental preservation' (2009) *The Common Law Review* 8; M S Benn (note 168 above) 207 at fn 14; H C Dunning (note 170 above) 519; J L Huffman 'A fish out of water: the public trust doctrine in a constitutional democracy' (1988-1989) 19 *Environmental Law* 540; T J Hannig 'The public trust doctrine expansion and integration: a proposed balancing test' (1983) 23 *Santa Clara Law Review* 214; S M Jawetz 'The public trust totem in public land law – ineffective – and undesirable – judicial intervention' (1982-1983) 10 *Ecology L Q* 463; J L Sax 'Liberating the public trust doctrine from its historical shackles' (1980-1981) 14 *U.C. Davis L Rev* 185. For example, to establish that the origin of the doctrine is anchored in *res publicae,* Gardner discusses the fact that the right of access to the sea and shores were considered to be inviolable in Roman times and as a consequence of this, no private ownership of these entities was allowed. See D J Gardner 'The United States Supreme Court expands the public trust doctrine' (1989) 24 *Land and Water Law Review* 348 and J Searle 'Private property rights yield to the environmental crisis: perspectives on the public trust doctrine' (1989-1990) 41 *South Carolina Law Review* 898 – 899. However, the sea and its shores was classified as both *res publicae* and *res communes* by different authors. Others argue that the origins of the public trust are found in Justinian's declaration concerning common property, (that is, *res communes*) which included running water, the sea and its shores. See in this respect R J Lazarus (note 170 above) 633; G R Scott (note 168 above) 24 – 25. See also A B Klass (note 169 above) 699 fn 8. Glazewski, however, incorrectly states that the public trust doctrine has as its basis the concept of *res universitatis.* See Glazeswi (note 9 above) 17.

[179] T P Brady (note 174 above) at fn 88.

[180] J L Sax (note 178 above) 475.

[181] See note 11 above. However, see *Nat'l Audubon Society v. Superior Court* 658 P.2d 709 (Cal. 1983) where the court relies on Justianian's definition of common things ('the air, running water, the sea…') as a basis for the public trust doctrine.

[182] C F Wilkinson 'The headwaters of the public trust: some thoughts on the source and scope of the traditional doctrine' (1988 – 1989) 19 *Environmental Law* 431; T J Hannig (note 178 above) 214.

for the benefit of the public.[183] Over time, all land which fell into this category became part of a public trust held by the King.[184] The King could alienate title to private individuals, subject to rights of access held by the public for the purpose of, amongst other things, navigation.[185] This protection of public land and resources came to embody any right of use that was essential for the purposes of 'commerce, trade and navigation', as well as fishing rights.[186] The property that fell into the trust was owned by the state, which was capable of being transferred if certain conditions were met. These conditions primarily prevented private ownership of trust property from interfering with the public's right to fish and navigate in the waters.[187]

Prior to attaining independence in 1776, America was an English colony[188] and the title to public trust lands was held by the Crown, in accordance with the principle of sovereignty.[189] Thirteen independent states were founded, each adopting the English common law,[190] and the Crown title to public lands consequently passed to these states.[191] The public trust doctrine was not yet specifically acknowledged, and disagreement exists as to when it was expressly introduced by the judiciary.[192] The existence of the public trust doctrine was

[183] C F Wilkinson (note 182 above) 431.

[184] D J Gardner (note 178 above) 348.

[185] T P Brady (note 174 above) 626; S M Jawetz (note 178 above) 463; R J Lazarus (note 170 above) 635; A Reiser 'Ecological preservation as a public property right: an emerging doctrine in search of a theory' (1991) 15 *Harvard Environmental Law Review* 398.

[186] J Searle (note 178 above) 900; H C Dunning (note 170 above) 517. On the importance of navigable waterways and commerce in relation to the doctrine, see C F Wilkinson (note 182 above) 431-439; T J Hannig (note 178 above) 217; R J Lazarus (note 170 above) 710; H C Dunning (note 170 above) 517.

[187] A Reiser (note 185 above) 398.

[188] J M Scheb *An Introduction to the American Legal System* (2002) 16 - 17.

[189] A B Klass (note 169 above) 4.

[190] J M Scheb (note 188 above) 39.

[191] *Martin v Waddell* 41 U.S. 16 Pet. 367 367 (1842); A B Klass (note 169 above) 703; D J Gardner (note 178 above) 348; C F Wilkinson (note 182 above) 443; T J Hannig (note 178 above) 216; J Lawrence 'Lyon and Fogerty: Unprecedented Extensions of the Public Trust' (1982) 70 *California Law Review* 1140.

[192] Some authors contend that it was introduced as early as 1821 in the case of *Arnold v Mundy* 6 N.J.L. 1 (1821) in the New Jersey Supreme Court. See T P Brady (note 174 above) 626 – 627; P Deveney (note 177 above) 55. However, Deveney asserts that any concept of the public trust was

confirmed in 1892 by the Supreme Court in *Illinois Central Railroad v Illinois*[193] which is widely considered to be the founding case of this doctrine.[194] The court held that the beds and water of navigable waterways were incapable of private ownership.[195] In addition, the state was 'neither free to alienate its navigable waters nor abdicate its public trust responsibilities over such waters in a manner inconsistent with its public trust duties'.[196] This limitation existed independent of legislation and could not be circumvented through legislative measures.[197] The effect of this case was to create a distinction between property that the state owned and of which it could freely dispose, and property which had to be carefully managed on behalf of all citizens and in the public interest.[198] The state is only free to alienate trust property under circumstances where the transfer of this interest to a private individual would either prevent the impairment of the public interest or promote the public interest.[199] In this respect, Deveney states:[200]

> [T]he Court articulated a principle that has become the central substantive thought in public trust litigation. When a state holds a resource which is available for the free use of the general public, a court will look with considerable skepticism upon any governmental conduct which is calculated *either* to reallocate that resource to more restricted uses *or* to subject public uses to the self-interest of private parties.

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erroneously introduced at this point and that the decision 'is an impressive display of judicial dexterity; as history it is nonsense' – see P Deveney (note 177 above) 56. The court in *Phillips Petroleum Co. v. Mississippi* 484 U.S. 469 (1988) states that *Shively* v. *Bowlby*, 152 U. S. 1 (1894) is the 'seminal case in American public trust jurisprudence'.

[193]146 U.S. 387 (1892). The exception herein was that land could be privately owned where the purpose thereof was to build either a wharf or a dock – cited in D J Gardner (note 178 above) 350. The exact sources that the Court relied on in Illinois Central is unknown – for a full discussion in this regard see C F Wilkinson (note 182 above) 455-457.

[194] C F Wilkinson (note 182 above) 450; J P Power (note 174 above) 426 – 427; R J Lazarus (note 170 above) 640; H C Dunning (note 170 above) 521.

[195] D J Gardner (note 178 above) 350; J Searle (note 178 above) 901.

[196] C N Brown 'Drinking from a deep well: The public trust doctrine and western water law' (2006) 34 *Florida State University Law Review* 12;

[197] A B Klass (note 169 above) 4.

[198] *Illinois* 452. P Deveney (note 177 above) 60; E Van der Schyff (note 4 above) 762 – 763. E van der Schyff (note 166 above) 126. A B Klass (note 169 above) 4.

[199] *Illinois* 453; H C Dunning (note 170 above) 520; E Van der Schyff (note 4 above) 763; A B Klass (note 169 above) 4.

[200] J L Sax (note 178 above) 490.

Prior to the 1970s, the historical development of environmental legislation in America was piecemeal,[201] and these developments were for the most part only induced by public pressure following environmental incidents.[202] In the 1970s, Sax published an article that detailed how the public trust doctrine had been utilised and developed by the courts to create a public interest in public lands that created environmental obligations for the state.[203] At a time when the public had no standing, the doctrine provided the public with a right to challenge the state on public trust issues. His discussion showed that the courts had responded to the need to fill a vacuum in the environmental legislation in American law, and this reactionary approach helped shaped the doctrine.[204]

In his seminal work, Sax argued that in order for a broader theory in this context to be of any real use, it required three general tendencies. The first was that it should afford the public with a legal right. The second requirement was that this right would have to be enforceable against the state. The final criterion required that the doctrine be flexible enough to protect any modern environmental concern. He argued that the public trust doctrine contained these three features and should therefore be utilised as a mechanism for environmental protection.[205]

There are three ways in which the doctrine has been invoked in litigation in America. Firstly, the state has utilised it to hold private parties accountable for violations of the doctrine. The second manner in which it has been utilised is the corollary, namely, when private bodies use the doctrine to hold the state accountable to its obligations. The third way is for private bodies to hold each other accountable for a violation of the doctrine.[206]

[201] P Deveney (note 177 above) 16 fn 11.

[202] J L Sax (note 178 above) 474; J Searle (note 178 above) 897, 913.

[203] See J L Sax (note 178 above) 471; A B Klass (note 169 above) 6 – 7; E van der Schyff (note 166 above) 131.

[204] J L Sax (note 178 above) 473 – 474.

[205] J L Sax (note 178 above) 474. This flexibility is apparent in the doctrine – see A Reiser (note 185 above) 394; E van der Schyff (note 166 above) 132 – 133; R Lazarus (note 170 above) 642.

[206] R J Lazarus (note 170 above) 645 – 646; A B Klass (note 169 above) 7.

Sax also set out the nature of the restrictions that must be imposed on the state as a consequence of the operation of this doctrine. In the first instance, property that falls within the public trust must be accessible for public use and this use must serve a public purpose; secondly, property subject to the public trust is incapable of alienation (barring a few exceptions as discussed below); and finally, the public purpose assigned to the resource must be utilised for specific uses.[207] These principles form the framework within which the doctrine operates.

Through the developments of the courts and the writings of Sax, the doctrine that originally only afforded a right of access and a prohibition on the alienation of certain public land was developed into a mechanism of environmental protection.[208] However, this development has not escaped criticism, and it has been argued that the doctrine should be returned to its original form, as a mechanism that only regulates access to the seashore and the beds of navigable waters.[209] These arguments are discussed below.

That the public trust doctrine is now a mechanism of environmental stewardship finds resonance in a number of cases, where it has been effectively used to protect natural resources.[210] For example, the Supreme Court held that it was impermissible for the state to circumvent the doctrine by legislating out of its obligations.[211] A similar approach was adopted in *National Audubon Soc'y v Superior Court (Mono Lake)*[212] where the court held that the doctrine could not be abolished unless a public purpose to do so could be shown.[213] It held that the

[207] J L Sax (note 178 above) 477; E Van der Schyff (note 4 above) 760; J P Power (note 174 above) 427.

[208] A B Klass (note 169 above) 6 – 12.

[209] R J Lazarus (note 170 above) 691; H C Dunning (note 170 above) 517.

[210] See E van der Schyff (note 149 above) 376 – 377.

[211] A B Klass and L Huang 'Restoring the trust: water resources and the public trust doctrine' (2009) 908 *Center for Progressive Reform* 3.

[212] 658 P.2d 709 (Cal. 1983).

[213] The court stated specifically that 'the public trust is more than an affirmation of state power to use public property for public purposes. It is an affirmation of the duty of the state to protect the prople's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust'. See also H C Dunning (note 170 above) 520 fn 33. *International Paper Co. v.*

doctrine was a 'state-level constitutional limitation on legislative power to give away trust resources'.[214] The court recognised that the 'public trust doctrine applied to inland, navigable lakes and required the state to take into account ecological and aesthetic interests in making water allocation decisions, even where state statutes did not appear to allow consideration of such concerns'.[215]

The duty to act in the public interest does not necessarily entail an absolute prevention on the transfer of public lands to private entities or individuals. There may be instances where the state has to award the use of water for purposes that may detract from trust uses, in order to further economic interests.[216] There is nothing barring the state from doing so, according to the above dictum, provided that such action is consistent with the state's duties as trustee – that is, in the best interests of the beneficiaries.[217]

Today, the doctrine represents the interface between public and private interests in land and resources, and the judiciary's response to the increased competition for these diminishing resources.[218] The doctrine is also at the centre of the conflict between furthering the notions of ownership and private property, versus the protection and management of finite resources for future generations.[219] The absoluteness of ownership is constantly being eroded so that public interests in

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Mississippi State Highway Dept., 271 So.2d 395, 399 (Miss. 1972); *Treuting v. Bridge and Park Commission of City of Biloxi*, 199 So.2d 627, 633 (Miss. 1967); *Money v. Wood*, 152 Miss. 17, 118 So. 357 (1928).

[214] A B Klass and L Huang (note 211 above) 3.

[215] *Nat'l Audubon Society v. Superior Court* 658 P.2d 709 (Cal. 1983); A B Klass (note 169 above) 10.

[216] R Roos-Collins 'A plan to restore the public trust uses of rivers and creeks' (2004) 83 *Tex L Rev* 1932.

[217] R Roos-Collins (note 216 above) 1932. However, see discussion below showing that certain states have prohibited the economic gain from being used as a factor in the establishment of a public purpose. A B Klass (note 169 above) 4.

[218] J Searle (note 178 above) 897.

[219] *W.J.F. Realty Corp. v. State*, 672 N.Y.S.2d 1007 (N.Y. App. Div. 1998) 1009. *Glisson v. City of Marion*, 720 N.E.2d 1034, 1045 -47 (Ill. 1999; J Searle (note 178 above) 916; H C Dunning (note 170 above) 516. A B Klass (note 169 above) 10; E van der Schyff (note 149 above) 378. However, E Van der Schyff points out that it has also been argued that the doctrine serves to harmonise the competing concerns between private and public property. M C Blumm 'The public trust doctrine and private property: The accommodation principle' (2010) 27 *Pace Environmental LR* 650.

resources can be ensured, presenting a tension between private and public interests.[220]

3.2. Inadequacies of the Public Trust Doctrine

The doctrine is predominantly procedural in nature and has been described as a mechanism by which to hold the state accountable.[221] At its core, the doctrine affords the public access to navigable waterways and the seashore.[222] However, that represents the sum of information upon which academics, the courts, and Congress have managed to agree.[223] What follows is a descriptive account of the debates and disagreements that go to the heart of the nature and functioning of the doctrine. This discussion does not attempt to present a thorough account of the issues and discrepancies. Instead, a number of key issues that are relevant to this thesis will be discussed, highlighting the difficulties with the doctrine along the way.

3.2.1. The Doctrine's Amorphous Nature

While some argue that the flexibility of the doctrine is a strength,[224] its 'amorphous' nature[225] means that it is difficult to define and is inconsistently applied in the various states.[226] This raises difficult questions,[227] for example, to which resources does the doctrine apply and how are they differentiated?; is the content of the doctrine procedural or substantive?; who owns these resources and can they be owned by the public?[228] Further criticism is that the doctrine is 'truly

[220] J Searle (note 178 above) 916.

[221] J P Power (note 174 above) 427.

[222] A Reiser (note 185 above) 394.

[223] G R Scott (note 168 above) 15 – 16.

[224] See note 176 above.

[225] R J Lazarus (note 170 above) 632; C Rose 'Joseph Sax and the idea of the public trust' (2003) 8 *Issues in Legal Scholarship* 5; L Bento (note 178 above) 7; A B Klass (note 169 above) 2.

[226] L Bento (note 178 above) 7.

[227] G R Scott (note 168 above) 16 – 23.

[228] C Rose (note 168 above) 5 – 6.

political/legal in content, and philosophical/social in context',[229] that is, the doctrine is fluid and shaped by the socio-political context of the time.[230] Clear evidence of this exists, as the doctrine in its original form was inherently economic, catering to the needs of a society in the throes of industrialisation.[231] In contemporary society, however, it is being used to further interests related to environmental concerns. While the focus of the modern doctrine is environmental protection, nothing in the underlying principles of the doctrine require that this should continue in the future - the doctrine simply requires that the state must further a public purpose, and not necessarily a public purpose favouring environmental protection.[232]

Each American state is entitled to provide the content to the doctrine independently, which also results in difficulties in defining the doctrine, as application in the different states has been widely varied. These differences can be traced back to the 'equal footing doctrine', in terms of which each state is afforded the same rights and responsibilities, subject to their own interpretation thereof.[233] In accordance with this doctrine, the various states must utilise the public trust doctrine but each can apply this doctrine differently, resulting in a multitude of various interpretations.[234] However, Bento notes that this lack of consistency can be advantageous, as it affords states the opportunity to create their own

[229] G R Scott (note 168 above) 23; M S Benn (note 168 above) 208.

[230] M S Benn (note 168 above) 209; J L Huffman (note 178 above) 531.

[231] M S Benn (note 168 above) 209; L Bento (note 178 above) 8.

[232] M S Benn (note 168 above) 209.

[233] *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 11 L.Ed. 565 (1845); L Bento (note 178 above) 8; J Searle (note 178 above) 903; M S Benn (note 168 above) 207; C F Wilkinson (note 182 above) 459; T J Hannig (note 178 above) 216; A B Klass (note 169 above) 4. *Oregon ex rel. State Land Board v. Corvallis Sand and Gravel Co.*, 429 U.S. 363, 370-78, 97 S.Ct. 582, 586-91, 50 L.Ed.2d 550, 558-63 (1977). The Supreme Court of Mississippi in *Cinque Bambini Partnership v Mississippi*, 491 So. 2d 508, 511 (Miss. 1986) III held that 'once Mississippi had been admitted to the Union and once the public trust had been created and funded, the role of the equal footing policy ended and title to the lands conveyed in trusts became vested in the state, subject, of course, to the trust'.

[234] C F Wilkinson (note 182 above) 425; T J Hannig (note 178 above) 218; J Lawrence (note 191 above) 1141.

framework within which to address the environmental concerns unique to the area.[235]

3.2.2. Taxonomy and Hierarchical Functioning of the Doctrine

The uncertainties of the doctrine are not limited to the nature thereof as the legal source and classification of the doctrine is also problematic.[236] There is uncertainty as to whether the origin of the doctrine is the federal common law and, further, whether it is to be defined generally as a federal or state level doctrine.[237] There is no express provision for the doctrine at a federal constitutional level. However, it has been argued that the doctrine is an implied constitutional doctrine and therefore originates from the constitution.[238]

Given that no state may legislate out of its public trust duties, it seems appropriate to position it as a federal level doctrine.[239] This notwithstanding, the Supreme Court has held that each state is entitled to establish the parameters and content thereof, indicating that the doctrine operates only at a state level.[240] However, it is possible to reconcile these approaches by acknowledging that the doctrine creates a federal restriction on the alienation of trust resources, which states may not circumvent, but pursuant to this they are free to legislate the terms of this obligation provided its satisfies the minimum requirements thereof.[241]

Over and above the confusion created by the unknown source of authority of the doctrine there is also uncertainty as to the classification of the doctrine within the legal system. The possibilities include, but are not limited to, administrative law,

[235] L Bento (note 178 above) 8; J Searle (note 178 above) 910.

[236] J L Huffman (note 178 above) 527.

[237] A B Klass (note 169 above) 5.

[238] H C Dunning (note 170 above) 523. See, however, J Lawrence (note 191 above) 1141, who argues that the doctrine has no basis in the federal common law.

[239] A B Klass (note 169 above) 5.

[240] See *Phillips Petroleum Co. v. Mississippi* 484 U.S. 469 (1988) as discussed in A B Klass (note 169 above) 5, 12 – 16 and C F Wilkinson (note 182 above) 462.

[241] A B Klass (note 169 above) 5; C F Wilkinson (note 182 above) 462.

constitutional law, property law or a combination of the above.[242] Another possibility is that the doctrine is based in the 'state exercise of police power' and the doctrine is a consequence of these powers.[243] There is also case law that indicates that the doctrine is classified in terms of the law of trusts[244] and, consequently, it has been compared to an ordinary commercial trust and its associated requirements.[245] However, the fiduciary duties placed on states as trustees of natural resources go beyond those of an ordinary trustee in the commercial realm.[246] Huffman points out that the fundamental basis of a trust is a tripartite relationship between the creator of the trust, the trustee/s and the beneficiary/ies.[247] In this tripartite relationship, the actions and intentions of the creator are paramount to the interpretation of the trust purposes.[248] In the context of America and the doctrine, there is no discernible creator of the trust,[249] and no apparent moment at which the intentions of this fictitious creator can be ascertained by the court.[250] Consequently, the trust is an inappropriate characterisation of the doctrine.[251]

In addition, it has been argued that the doctrine provides the substantive grounds for judicial review of administrative decisions and is therefore anchored in administrative law.[252] Huffman, however, argues that the doctrine does not form

[242] J L Huffman (note 178 above) 527.

[243] J L Huffman (note 178 above) 529.

[244] *Cinque Bambini Partnership v Mississippi*, 491 So. 2d 508, 511 (Miss. 1986) as discussed in J L Huffman (note 178 above) 528.

[245] L Bento (note 178 above) 8; J P Power (note 174 above) 420 – 421; J S Stevens 'The public trust: A sovereign's ancient prerogative becomes the people's environmental right' (1980) 14 *UC Davis LR* 195, 197–198; E van der Schyff (note 166 above) 129; E van der Schyff (note 149 above) 373 – 374.

[246] L Bento (note 178 above) 8.

[247] For a thorough exposition on why the public trust doctrine is not comparable to a commercial trust, see J L Huffman (note 178 above) 534 – 545.

[248] J L Huffman (note 178 above) 535 – 536.

[249] For an extensive discussion on this issue, see J L Huffman (note 178 above) 537.

[250] J L Huffman (note 178 above) 536.

[251] See also E van der Schyff 'Unpacking the public trust doctrine: a journey into foreign territory' (note 166 above) 129 - 130.

[252] S M Jawetz (note 178 above) 462.

the basis of judicial review.[253] Instead, he argues that the doctrine is properly anchored in property law,[254] and the limitations placed on private ownership by the doctrine are akin to an easement (the equivalent of the servitude in South African law).[255] This is consistent with the assertion that the origins of the doctrine are in the Roman law classification of *res publicae*, as discussed above.[256]

3.2.3. Nature of the Rights Created by the Doctrine

As set out above, the doctrine's content is unclear because it does not have defined boundaries, the source of its authority is unclear, and it is uncertain as to how it is to be classified within the legal system. However, these problems are not the only issues with the doctrine in terms of the uncertainty it creates. In addition, the doctrine is unclear as to the nature of the rights it affords the public, the types of property that it protects, and the nature of this protection.

From the outset, there are no clear categories of property specifically protected by the doctrine, given the varied protection offered from state to state.[257] At its most basic level, the doctrine creates a beneficial interest in navigable water for the public, which facilitates the use of water for commercial, navigation and fishing purposes.[258] Implicit in this first notion is surely that the state is obliged to maintain the ecological viability and sustainability of water for these purposes, a concept acknowledged by the courts in certain states.[259] The state is the trustee of

[253] J L Huffman (note 178 above) 527.

[254] J L Huffman (note 178 above) 527; H C Dunning (note 170 above) 516; T J Hannig (note 178 above) 211; R J Lazarus (note 170 above) 642.

[255] J L Huffman (note 178 above) 527-8. See also H C Dunning (note 170 above) 520; E van der Schyff (note 166 above) 130.

[256] However, see note 321 below where it is clear that the public trust doctrine does give rise to obligations in terms of administrative law.

[257] G R Scott (note 168 above) 23; J P Power (note 174 above) 429; S M Jawetz (note 178 above) 465; R J Lazarus (note 170 above) 647.

[258] R Roos-Collins (note 216 above) 1932; T J Hannig (note 178 above) 217; A Reiser (note 185 above) 394.

[259] *Scott v. Chicago Park District* 360 N.E.2d 773 (Ill. 1977) 780; *Glisson v. City of Marion*, 720 N.E.2d 1034, 1045 -47 (Ill. 1999); *W.J.F. Realty Corp. v. State*, 672 N.Y.S.2d 1007 (N.Y. App. Div. 1998) 1009; R Roos-Collins (note 216 above) 1932.

water and this requires that the state 'prevent[s] unnecessary harm to public trust uses'.[260] Accordingly then, it may be appropriate for other resources to be protected to ensure that this right is upheld.[261] In this respect, the courts have specifically acknowledged the interdependence between humans and the environment, and the importance of protecting the environment for future generations.[262] However, a definitive guideline is not available to justify why other resources can be included within the scope of the doctrine.[263]

The equal footing doctrine allows each state to interpret the functioning of the doctrine relative to its own requirements.[264] The effect of this has been that different states have extended the protection of the doctrine to different types of resources. There have been three types of development of the doctrine in the various states. The first relates to the navigability of water, where some states include both navigable and non-navigable water within the protection of the doctrine.[265] The second development has seen the purpose for which the water is used extended to include recreational activities in addition to the core features protected by the trust.[266] Finally, the doctrine has been developed in some states to

[260] R Roos-Collins (note 216 above) 1932.

[261] *Scott v Chicago Park District* 360 N.E.2d 773 (Ill. 1977) 780; *Glisson v. City of Marion*, 720 N.E.2d 1034, 1045 -47 (Ill. 1999); *W.J.F. Realty Corp. v. State*, 672 N.Y.S.2d 1007 (N.Y. App. Div. 1998) 1009.

[262] *Scott v. Chicago Park District* 360 N.E.2d 773 (Ill. 1977) 780.*Glisson v. City of Marion*, 720 N.E.2d 1034, 1045 -47 (Ill. 1999). *W.J.F. Realty Corp. v. State*, 672 N.Y.S.2d 1007 (N.Y. App. Div. 1998) 1009.

[263] A Reiser (note 185 above) 395.

[264] See note 233 above.

[265] *Philips Petroleum Co v Mississippi Oregon case* 108 S. Ct. 791 (1988); C F Wilkinson (note 182 above) 465; H C Dunning (note 170 above) 517; J L Huffman (note 178 above) 530-31; T J Hannig (note 178 above) 223 – 224l; D J Gardner (note 178 above) 353; J Searle (note 178 above) 901 – 904.

[266] *Matthews v. Bay Head Improvement Ass'n,* 471 A.2d 355, 363 (N.J.), *cert. denied*, 469 U.S. 821 (1984); *State ex rel. Thompson v. Parker* 200 S.W. 1014, 1017 (Ark. 1917), *cert. denied*, 247 U.S. 512 (1918); *Diana Shooting Club v. Husting*145 N.W. 816, 820 (Wis. 1914); J P Power (note 174 above) 429; S M Jawetz (note 178 above) 469.

include non-water resources such as wildlife, state parks, beaches and marine life.[267]

However, the extension of the doctrine has not included all types of water, and most courts have not 'extended the common law doctrine beyond tidal or navigable waters, thus leaving unprotected inland resources that are unconnected to navigable lakes or rivers'.[268]

3.2.4. The Nature of the Public Interest / Purpose Requirement

It is a requirement of the doctrine that the resource in question be used for a public purpose.[269] This element is most often considered when a court is trying to ascertain whether private ownership of trust land should be allowed. However, this is problematic, particularly in the context of the democratic process.[270] For example, in the context of public land, the original form of the doctrine only pertained to water.[271] As a result, ascertaining a public purpose where access to water is not in issue is problematic.

While the courts exercised judicial restraint in the context of public land, there was no duty that required them to do so. The ability of the courts to review state action allows a highly flexible standard of judicial review,[272] which may undermine democratic processes. In the context of the public interest, the question arises as to whether it is appropriate for the courts to make this decision, and, if so, what parameters are in place for the courts to decide what necessitates a good or better public purpose.

[267] C F Wilkinson (note 182 above) 465; R J Lazarus (note 170 above) 649; A Reiser (note 185 above) 394l; J P Power (note 174 above) 429 – 430; A Reiser (note 185 above) 404; J Searle (note 178 above) 909.

[268] A B Klass (note 169 above) 5.

[269] C Brown (note 196 above) 15.

[270] See note 306 below.

[271] S M Jawetz (note 178 above) 466.

[272] See note 304 below.

The various states have interpreted the requirement of public interest quite differently. In some states, a public economic gain may constitute a valid public purpose, whereas in others, it would not. In this regard, the Supreme Court held that economic development can provide a valid public purpose.[273] This line of reasoning was followed in a case where part of Lake Michigan was filled for the creation of a private university, evidencing that context is all-important.[274] In this instance, the court held that the economic and social advantages of alienating trust land in these circumstances satisfied the requirements for a valid public purpose.[275]

However, states such as Massachusetts[276] and Wisconsin[277] have held that the 'public use is an end in itself' and an undertaking to weigh it against the potential economic gain is not permissible.[278] The public purpose requirement has also been interpreted to include recreational activities in some states.[279] The court in South Carolina deviated from the necessity that the public purpose be in the interests of commerce when it held that recreational public use of navigable waterways would be deemed a legitimate public purpose.[280]

In Wisconsin, the court identified a number of considerations for the determination of a legitimate public purpose. These considerations involved the

[273] M S Benn (note 168 above) 213.

[274] *Lake Michigan Federation Fed'n,* 742 F. Supp. 441, 445 (N.D III. 1990).

[275] *Lake Michigan Federation Fed'n,* 742 F. Supp. 441, 445 (N.D III. 1990).

[276] *Commonwealth v. Inhabitants of Charlestown,* 18 Mass. (1 Pick.) 180, 187-88 (1822).

[277] *In re Crawford County Levee* 196 N.W. 874, 878 (Wis. 1924) *cert. denied*, 264 U.S. 598 (1924).

[278] J P Power (note 174 above) 431.

[279] The court in the Mississippi state has broadened the required public purpose and the public trust doctrine now includes navigation and transport [*Rouse v. Saucier's Heirs,* 166 Miss. 704, 146 So. 291 (1933); *Martin v. O'Brien,* 34 Miss. 21 (1857); fishing [*State ex rel. Rice v. Stewart,* 184 Miss. 202, 231, 184 So. 44, 50 (1938)], as well as recreational activities [*Treuting v. Bridge and Park Commission of City of Biloxi,* 199 So.2d 627, 632-33 (Miss. 1967)]. It has also been extended to include environmental and marine protection [*Marks v. Whitney,* 6 Cal.3d 251, 491 P.2d 374, 98 Cal. Rptr. 790 (1971)]. Similarly, California has also extended the doctrine widely. See *Nat'l Audubon Society v. Superior Court* 658 P.2d 709 (Cal. 1983) and J Lawrence (note 191 above) 1138.

[280] *State v South Carolina Coastal Council* 289 S.C. 455, 346 S.E.2d 716 (1986) as cited in J Searle (note 178 above) 907.

extent and type of public purpose, as well as issues of access and control to the public lands. They also involved ascertaining whether the public use would be completely obliterated or only somewhat impaired. Finally, the court required a balancing act to be undertaken between the extent to which the original purpose would be undermined as compared to the public benefit gained from the new use. In establishing these requirements, the court implicitly recognised the polycentric nature of the enquiry on which the legislature and administrative agencies would have to embark, in order to take a decision concerning public lands.[281]

A difficulty that the court will encounter is establishing the standard of care imposed on the state in the protection of resources.[282] There is also no way to gauge the settled expectations of society or what is in the public interest.[283] Some states have held that the doctrine imposes positive obligations on the state, whilst others have held that the obligations are instead either restrictive in nature, or are negative obligations.[284] In the latter category, there are further differing interpretations as to the standards of these limitations. There is also a lack of clarity as to what duties are required by the doctrine. As a result, the courts are unable to ensure or enforce consistency. While it is clear that absolute preservation and protection is not possible, the extent to which this must be achieved is unknown. This presents great interpretive difficulties for the court as there is no fixed standard against which administrative bodies can be held to account.[285] Often, specific bespoke legislation in the various different areas is clearer and easier to utilise than the public trust doctrine. As a result, statutory law is more often applied than the common law doctrine.[286]

[281] J L Sax (note 178 above) 517.

[282] R J Lazarus (note 170 above) 650.

[283] A Reiser (note 185 above) 417.

[284] R J Lazarus (note 170 above) 650.

[285] S D Baer 'The public trust doctrine – a tool to make federal administrative agencies increase protection of public trust land and its resources' (1987 – 1988) 15 *Boston College Environmental Affairs Law Review* 415; A Reiser (note 185 above) 416.

[286] S D Baer (note 285 above) 415.

3.2.5. Access to Resources or Resource Protection

In some states, the modern public trust doctrine embraces the key principles of environmental protection, including sustainability, community involvement, inter-generational equity and stewardship.[287] Thus far, the doctrine has been utilised more often when issues of public access to land have arisen, rather than in the context of the protection of natural resources.[288] The right of access itself raises a problem for environmental protection. Typically, the doctrine seeks to ensure access to the resources that fall within its scope. However, this runs contrary to contemporary environmental regulatory regimes, which are typically trying to limit public access thereto.[289] As a result, the two key features of the modern doctrine, namely access and protection,[290] may serve conflicting goals.

Huffman argues that the doctrine is anchored in commerce, economic productivity and the exploitation of resources.[291] This has been supported by Benn who asserts that the doctrine is not primarily concerned with environmental protection, but instead with the protection of economic development.[292] In his analysis he proposes that there is no philanthropic ideology underlying the doctrine, and it is not intended for the public benefit in the sense that this entails any form of environmental preservation,[293] except to the extent that this furthers the economic interests served by the doctrine.[294] Sax himself has acknowledged that, though it is unlikely, it is possible that the trust purpose could again become commercial, rather than protective, in nature.[295] It is not disputed that the types of resources

[287] A B Klass and L Huang (note 211 above) 1.

[288] A B Klass and L Huang (note 211 above) 3.

[289] R J Lazarus (note 170 above) 711.

[290] E van der Schyff (note 166 above) 133.

[291] A Reiser (note 185 above) 415; C Rose (note 168 above) 8 – 9.

[292] M S Benn (note 168 above) 205; C Rose (note 168 above) 8 – 9.

[293] M S Benn (note 168 above) 205; A Reiser (note 185 above) 415.

[294] A Reiser (note 185 above) 415.

[295] J L Sax 'The limits of private rights in public waters' 19 *Environtmental Law*. 473 (1988-1989) 478.

that would merit being classified as trust property are susceptible to common use and are also valuable.[296]

3.2.6. Furthering Democratic Principles

Public participation is a key feature of democracy and consequently, prior to the alienation of public trust property, the public must be informed and participation in the decision-making process must be ensured. However, public resources can be disposed of by administrative agencies with very little public knowledge by using what Sax terms 'low-visibility decision-making'. The problem is that, in these instances, the state is often intentionally attempting to reduce the level of public participation. The state may also intentionally cause development to reach the point where a court would be hesitant to interfere, despite the lack of public participation, where a significant amount of resources had already been utilised on the project.[297]

The public trust doctrine has been used as the basis for expressly requiring public participation in the context of trust property. In the *Gould v. Greylock Reservation Commission*,[298] the court confirmed the existence of a right in favour of the public, wherein any discretionary decisions made by the state which would affect public trust property had to be explicitly confirmed by the public.[299] The court further held that mere acquiescence would be insufficient.[300] The court's approach in these instances has not been to 'make policy decisions concerning the proper use of public trust lands, but has instead developed a means for ensuring that those who do make the decisions do so in a publicly visible manner'.[301]

A key question in the context of the public trust doctrine is which 'democratic institutions are best suited for protecting public interests in ecological

[296] H C Dunning (note 170 above) 523.

[297] J L Sax (note 178 above) 497 – 498.

[298] 350 Mass. 410, 215 N.E.2d 114 (1966).

[299] J L Sax (note 178 above) 498 – 499.

[300] J L Sax (note 178 above) 499.

[301] J L Sax (note 178 above) 502.

resources'.[302] There is wide criticism of the doctrine due to the difficulty in finding a foundational basis for its inception, with some referring to these sources as a 'myth' or 'legal fiction'.[303] This has resulted in critics arguing that the doctrine is merely a vehicle by which judges can risk making difficult decisions without anchoring their opinions in certain law.[304] This difficulty is not experienced in South Africa, as trusteeship is a constitutional and statutory creature and judicial interference would be warranted where any of the duties of trusteeship in terms of the legal framework were breached.[305]

In the context of judicial review on the basis of the doctrine, there are two competing positions as to whether it further enhances or obscures democracy. On the one hand, judicial review of administrative actions enhances democracy by ensuring sufficient protection of the public interest. However, this raises the issue of the counter-majoritarian dilemma in the context of the separation of powers.[306] The separation of powers requires a legal separation between the powers and duties of the legislature, executive and the judiciary, with each ensuring that the other's powers are kept in check. In this way, the principles of democracy are furthered by ensuring that the powers of each institution are diluted. However, the judiciary, an unelected group of officials, is entitled to investigate the conduct of the legislature or the executive, both of which are democratically elected bodies representing the majority. Consequently, an unelected minority may impose its wishes on an elected body, which has been given the power to represent the wishes of the majority, giving rise to the problem known as the counter-

[302] A Reiser (note 185 above) 395.

[303] T P Brady (note 174 above) 632; R J Lazarus (note 170 above) 639, 656.

[304] T P Brady (note 174 above) 632; S M Jawetz (note 178 above) 457. See for example J D Kearney and T W Merrill 'The origins of the American public trust doctrine: what really happened in *Illinois Central*' (2004) 71 *University of Chicago Law Review* 924 who comments that the decision in the *Illinois* case was a 'product of the exigencies of litigation' – the reason that the doctrine was utilized was to provide Justice Field's opinion with the 'doctrinal basis to defeat the Illinois Central's powerful vested-rights argument'.

[305] See Ch 3 above.

[306] S M Jawetz (note 178 above) 491.

majoritarian dilemma. The extent to which this interference is appropriate will be in issue as well as the extent to which judicial deference should be exercised.[307]

In 1970, when Sax wrote an extensive article on the doctrine, he acknowledged that there were no clear outer limits for the scope of state authority. This lack of clear guidance meant that there was necessarily more interaction between the courts and the state.[308] The foundations established in *Illinois Central* are so broad that it allowed the court to enquire into programs that have been legitimately introduced by democratic processes.[309] The criticism is therefore that the judiciary can too easily interfere in the actions of the legislature and the executive, giving rise to the counter-majoritarian dilemma. Despite this, Sax has argued that the doctrine is a 'medium for democratisation'.[310]

In more recent articles, on the uncertainties discussed above, Sax has said the following:[311]

> [T]he doctrine which a court adopts is not very important; rather, the court's attitudes and outlook are critical. The 'public trust' has no life of its own and no intrinsic content. It is no more – and no less – than a name courts give to their concerns about the insufficiencies of the democratic process.

By contrast, however, it can be argued that the public trust doctrine affords the judiciary with an element of control over inherently public resources. Legislatures may be susceptible to intense pressure from special interest groups, especially when they are well-funded and organised, as compared to a 'large and diffuse' opposition.[312] Dunning argues that the very nature of the doctrine and the fact that it aims to protect natural resources is exactly why the courts should be able to intervene and exercise powers of oversight over the decisions of the legislature.[313]

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[307] I Currie and J De Waal *The New Constitutional and Administrative Law* (2001) 35 – 36; A Reiser (note 185 above) 416.

[308] J L Sax (note 178 above) 486.

[309] J L Sax (note 178 above) 491.

[310] J L Sax (note 178 above) 509.

[311] J L Sax (note 178 above) 521.

[312] C Brown (note 196 above) 15; L Bento (note 178 above) 8.

[313] H C Dunning (note 170 above) 523.

This is consistent with the separation of powers doctrine, which requires due deference and respect to be maintained between the executive, legislature and judiciary, whilst ensuring that oversight mechanisms are in place to balance the three institutions.[314]

However, the question remains – is it desirable that the judiciary should adopt such an active role in the protection of resources, particularly where such activism is likely to interfere with legitimate state and legislative policies?[315] Some authors argue that this level of judicial intervention is both inappropriate and unnecessary.[316] As Lazarus states, 'the doctrine…unduly relies on a pro-environment judicial bias'.[317] Huffman argues that the public trust doctrine and its proponents further their own ideas while at the same time destabilising democracy by allowing democratic decisions to be substituted by those made by a minority.[318] It is not necessarily true that the judiciary will best serve the interests of the public by protecting the environment, nor is it necessarily best placed to do so.[319] For one, the judiciary lacks the expertise, time and infrastructure to do so properly.[320]

However, while judicial deference is used to temper the undemocratic nature of judicial review, it may also prevent administrative agencies from being held accountable to their duties. The courts may refuse to interfere purely to avoid offending the separation of powers. The courts may also defer to the expertise of the agency, as they presume agency actions to be valid and rational. The conditions that must be breached in order to give rise to judicial interference include an arbitrary, capricious or unlawful decision, or an abuse of discretion.

[314] I Currie and J de Waal *The Bill of Rights Handbook* 6ed (2013) 18.

[315] C F Wilkinson (note 182 above) 466; H C Dunning (note 170 above) 522.

[316] See in this regard R Lazarus (note 170 above) 631; S M Jawetz (note 178 above) 495; J L Huffman (note 178 above) 565.

[317] R Lazarus (note 170 above) 633, 692 as discussed in C F Wilkinson (note 182 above) 467.

[318] A Reiser (note 185 above) 415;E van der Schyff (note 166 above) 138.

[319] R J Lazarus (note 170 above) 712; S M Jawetz (note 178 above) 469.

[320] A Reiser (note 185 above) 416; R J Lazarus (note 170 above) 712 - 713; S M Jawetz (note 178 above) 469 - 473; P Deveney (note 177 above) 13.

Given the array of factors that must be considered in making an administrative decision, as well as the human resources and skills required, courts are hesitant to interfere with these decisions, unless there is clear evidence that at least one of the duties has been breached. However, there are instances where these administrative requirements will fall short of protecting trust land, and consequently judicial intervention may be necessary.[321]

An example of this problem is the implementation of the Multiple-Use Sustained-Yield Act of 1960, which allows administrative agencies to allocate the percentages of resources to be dedicated to different purposes. The considerations that have to be taken into account require extensive investigation on the part of the relevant administrative agency. Accordingly, the courts may be unwilling to interfere, once these decisions have been taken unless there is clear evidence to suggest *mala fides.* In addition, this legislation prevents the courts from making a decision, once it has been ascertained that all relevant criteria were duly considered.[322]

In some instances, the court might be the last bastion of hope when administrative agencies have made erroneous decisions.[323] In most instances though, the legislature is best placed, both in terms of skills and capacity, to evaluate the public interest.[324] Thus, the approach to be adopted requires a balancing act between the need for judicial interference, as opposed to judicial deference, and the circumstances of each case will be paramount to informing the necessary balance. This is the approach that has been adopted in South African law.[325] In America, the Public Land Law Review Commission has confirmed this approach by offering some guidelines as to the nature and extent of judicial intervention required. The Commission stated that judicial review should ensure the proper use

[321] S D Baer (note 285 above) 413 - 414. See also J L Sax (note 178 above) 551 – 552. For example, in California provided the legislation was properly enacted for a purpose related to a trust use (even if only incidental), and in the absence of fraud or bad faith, the court is reluctant to intervene.

[322] S D Baer (note 285 above) 416 - 417.

[323] C F Wilkinson (note 182 above) 469-472.

[324] P Deveney (note 177 above) 13.

[325] See Ch 7 (note 192 below).

of discretion, curtail arbitrary or discriminatory decisions, and ensure that statutes and regulations are properly followed.[326]

3.3. Shortcomings of the Public Trust Doctrine as Model for Trusteeship in South African Water Law

As observed by a number of authors, and confirmed by the courts, the value of the public trust doctrine lies in its inherent adaptability and flexibility.[327] In this respect, the South African concept of trusteeship also embraces flexibility, but does so through the implementation of processes that facilitate flexible decision-making.[328] However, in both jurisdictions, this flexibility also gives rise to a number of difficulties, especially in terms of undermining legal certainty.

The public trust doctrine is primarily concerned with ensuring that trust property is not alienated by the state unless it is in the beneficial interest to do so. In addition, it is concerned with the right of access to resources for the purposes of fishing and navigation. In some states, the doctrine has been developed to encompass modern concerns such as 'recreation and aesthetic uses'.[329] Although it originally afforded only rights of access to navigable waterways for commercial purposes, it has been developed in some states to create a right of environmental protection. In South Africa, however, the primary goals of trusteeship are to facilitate the equitable access of water to persons on the basis of substantive equality, and to ensure the protection and preservation of the environment.[330] These duties are universal and cannot be derogated from in different areas of the country. While each catchment management area is able to create its own

[326] S M Jawetz (note 178 above) 491.

[327] *Marks v. Whitney* 491 P.2d 374 (Cal. 1971) 380; A B Klass and L Huang (note 211 above) 4; A Reiser (note 185 above) 394.

[328] See Ch 6 below.

[329] A B Klass and L Huang (note 211 above) 4; L Bento (note 178 above) 7; G R Scott (note 168 above) 20.

[330] Ch 2 (note 192 above).

Strategy, this must nevertheless further the goals of trusteeship and be consistent with the national Strategy.[331]

The implementation of the public trust doctrine as a tool for protecting environmental resources is limited for a number of reasons. These reasons include the fact that 'the common law tends to operate retrospectively rather than prospectively; it is sporadic and case-specific; it develops slowly in multiple jurisdictions, making a national and more immediate solution to a problem nearly impossible'.[332] However, trusteeship in South Africa is intended to facilitate the universal improvement of access to water resources, as well as the protection of the resource, throughout the country. The past two strategies have attempted to implement ambitious changes to the arena of water management.[333] Thus, whilst the American approach is focused on slow development on a case-by-case basis, South Africa requires the implementation of strategies throughout the country that are continuously revised to ensure that they cater for contemporary requirements.[334] This being said, South Africa has thus far inadequately implemented these plans owing to the infrastructural difficulties and lack of resources as outlined in Chapter 5.[335]

In addition, the separation of powers doctrine and the counter-majoritarian dilemma present serious barriers to the proper implementation of the public trust doctrine as an environmental tool. This criticism is experienced in South Africa as well where the review of administrative decision-making processes is questioned for the same reasons. In order to temper this criticism, the courts have adopted a respectful approach to decision-making, only interfering where at least one of the

[331] Ch 3 (note 413 above).

[332] A B Klass (note 169 above) 713.

[333] See discussion at Ch 3 (note 389 above).

[334] See discussion at Ch 3 (note 396 above).

[335] See Ch 5 (note 241 ff).

administrative grounds for review is present.[336] This normally entails assessing the reasonableness, lawfulness or procedural fairness of the state's policies.[337]

The inconsistencies in the application of the public trust doctrine result in uncertainty, not only in the application of the doctrine, but also the nature of the rights created, the types of property protected and the classification of the doctrine within the legal sphere. Consequently:[338]

> the common law public trust doctrine is clearly nowhere near a global solution to advancing protection for natural resources and the environment, whether threatened by state action or private action. However, the public trust doctrine can still play an important role in ensuring judicial review of actions that threaten natural resources and the environment where an environmental statute does not apply or is not being enforced, or where state constitutional provisions to protect natural resources do not exist or are ineffective.

Trusteeship, on the other hand, incorporates the most modern legal principles in the context of environmental management, including the principles of inter- and intra-generational equity, the precautionary principle and the polluter-pays principle.[339] In terms of environmental protection the state, as trustee, has been tasked with ensuring that the environment is used and developed in a manner that is both sustainable and furthers the goals of the Constitution.[340] The legal framework implemented in South Africa is by far one of the most progressive in the world.[341] The problem does not lie with the existing law, but rather, with the fact that the state has failed to properly implement the law, thereby failing to satisfy its duties of trusteeship.[342] The public trust doctrine does not provide any suggestions as to how this can be remedied. Instead, it is criticised by some

[336] *Logbro Properties CC v Bedderson NO and others* [2003] 1 All SA 424 (SCA) para 21; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (7) BCLR 687 (CC) para 46 – 48

[337] See discussion at Ch 7 below.

[338] A B Klass (note 169 above) 5.

[339] See Ch 5 (note 4 ff below).

[340] See Ch 5 (note 7 ff below).

[341] T Humby and M Grandbois 'Human right to water in South Africa and the *Mazibuko* decisions' (2010) 51 *Les Cahiers de Droit* 523; A Gowlland-Gualtieri 'South Africa's water law and policy framework: Implications for the right to water' (2007) 3 *International Environmental Law Research Centre* 1.

[342] See discussion in this regard at Ch 8 below.

authors as being of little use in the context of environmental protection, given the straight-forward mechanisms that have been implemented via statutory law.[343] These critics argue that proper utilisation of these statutory and regulatory mechanisms, as well as increased public participation, will serve as a more meaningful tool in the protection and management of the environment.[344]

In the context of South African law, the public trust doctrine does have similarities with the legislative notion of trusteeship. However, the South African legal framework deviates from the manner in which the doctrine operates, in a way that is suitable and favourable for the South African context.[345] Many of the criticisms that are faced by the doctrine in America are not experienced in South African law. The most important similarity between the two is the presence of the counter-majoritarian dilemma. However, this issue is not unique to this area of law and will be experienced whenever the court is asked to pronounce upon the validity of any of the decisions undertaken by the state.

4. Concluding Remarks

The purpose of this chapter was to evaluate the current academic reactions to the trusteeship clause. Neither the historical or comparative discussions provide satisfactory explanations of what public trusteeship is in South Africa. It is clear that both of these responses provide more questions than answers. The *Mostert* decision provides that water as a resource is now classified as *res communes*, and it is the assertion of this thesis that this applies to all water.[346] It has been argued that this classification, whilst historically inaccurate, may be better suited to the modern appreciation of water as a resource.[347] However, this shift in ideology has created a massive flaw in the current legal regime: theft of water is not possible.[348]

[343] T P Brady (note 174 above) 632.

[344] S M Jawetz (note 178 above) 457.

[345] Discussed at Ch 8 below (note 24 ff).

[346] See above at note 118.

[347] See above at note 146.

[348] See above at note 161.

As a result, the National Water Act requires immediate amendment in order to ensure that this loophole is closed. It is further advanced in this thesis that the ability to own water privately is not consistent with the broader statutory and constitutional goals. Ownership of water in any form should thus not be possible, even in the form of "bare" or "nude" ownership rights.

The public trust doctrine, too, is not necessarily of assistance insofar as a more meaningful understanding of trusteeship is concerned. It will be shown that many of the defects in the American doctrine are, in fact, catered for and remedied in the South African context. This analysis will be undertaken in Chapter 8.

Since this thesis is concerned mainly with the notion of state trusteeship in its narrower sense, its primary assertion is that statutory trusteeship did not change the nature of the state's role as an *administrator* of water as a resource. The *Mostert* decision clearly confirms that this is correct by stating that '[e]ffectively, the 1998 Act does no more than place all water within the aegis of state control, which control the State had in any event exercised over public water before it came into operation'.[349] However, the nature of these duties is completely different to that of the previous regime of water management. The National Water Resource Strategy provides that there are three primary goals of water management: sustainability, equity and efficiency.[350] Consequently, the success and shortcomings of trusteeship should be measured according to these goals. The content of sustainability, equity and efficiency are the focus of the discussion in Chapter 5.

[349] Para 23.

[350] See Ch 3 (note 407 above).

Chapter Five:
SUBSTANTIVE COMPONENTS OF TRUSTEESHIP

1. Introduction

The previous chapters discussed the historical background to water management; the legal framework of water management, and the sources of law that determine this framework, namely the Constitution, the applicable legislation and regulations, and the policies and strategies enacted in accordance therewith; as well as the historical and comparative research approaches to trusteeship. This chapter will discuss the substantive principles that can be discerned from the current legal framework, which are ultimately required to inform water management.[1]

Statutory trusteeship pertains to the protection, use, development, conservation, management and control of water, or more generally, the management of water. Further, the standards that water management must attain are required to ensure that the goals of sustainability and equity are met; that decisions are taken in the beneficial interest of all persons; and finally, that they are constitutionally compliant.

The constitutional requirements pertaining to water management were dealt with in Chapter 3. This chapter therefore aims to deal with the remaining three

[1] E van der Schyff refers to these substantive principles as the 'stewardship ethic' – see generally E van der Schyff 'Stewardship doctrines of public trust: Has the eagle of public trust landed on South African soil? (2013) 130 *South African Law Journal* 369 ff. M Kidd offers a different structure for the underlying principles of *Environmental Law* generally. These include the precautionary principle, the polluter-pays principle, the preventative principle, the principle of cooperation, the duty of care to avoid harm to the environment, life cycle responsibility and the public trust. None of these principles are omitted in the structure below. He also argues that of the variety of principles, there is only consensus as to the precautionary principle and the polluter-pays principle. See M Kidd *Environmental Law* 2ed (2011) 7 – 12.

requirements, namely sustainability, equity and the beneficial interest component. However, given that the Strategy provides the content for water management, these requirements will be discussed in terms of the key features of water management as enumerated by the Strategy, namely, sustainability, equity and efficiency.[2] These features aim to promote the Water Allocation Reform programme.[3]

2. Sustainability

Underlying the goals of water management is the principle of sustainability,[4] which entails a balancing act between the demands of environmental protection and the development and promotion of economic and social goals.[5] In the South African context, sustainability is required to 'secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development',[6] and is expressly required by the Constitution.[7]

[2] See Ch 3 (note 407 above).

[3] See Ch 3 (note 424 above).

[4] Any reference to sustainability includes sustainable development, and vice versa. For a more comprehensive discussion on sustainable development in South Africa, see J Glazewski *Environmental Law in South Africa* (2013) 1-15 ff. D du Toit, S Pollard and R Pejan 'A rights approach to environmental flows: What does it offer?' (2009) *The Association for Water and Rural Development* 1.

[5] Commentators argue that these three considerations should operate in an integrated fashion. Sustainable development will only be relevant where the operation of one of the values impacts or threatens the other values. See in this respect L Ferris 'Environmental rights and locus standi' in A Paterson and L Kotzé (eds) *Environmental Compliance and Enforcement in South Africa* (2009) 141 – 142; H Mackay 'Water policies and practices' in D Reed and M de Wit (eds) *Towards a Just South Africa: The Political Economy of Natural Resource Wealth* (2003) 60. See also D Hallowes and M Butler 'Power, poverty and marginalized environments' in D A McDonald (ed) *Environmental Justice in South Africa* (2002) 58 - 59 who discuss how the impact of market factors has the effect of alienating impoverished communities and labelling development in this regard as negative. See also J J Walmsley 'Market forces and the management of water for the environment' (1995) 21 *Water SA* 44; W du Plessis and A A du Plessis 'Striking the sustainability balance in South Africa' in M Faure and W du Plessis (eds) *The Balancing of Interests in Environmental Law in Africa* (2011) 416.

[6] S 24(b)(iii) of the Constitution. M Kidd (note 1 above) 24. See also L Ferris (note 5 above) 138 – 139, who argues that the Constitutional Court missed an opportunity to investigate the content of sustainability in *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Another* 2001 (3) SA 1151 (CC).

[7] Section 24(b)(iii) provides:

Sustainability is required by both the Constitution and the National Water Act, which establishes sustainable development as one of its primary goals.[8] Not only is it an express purpose of the Act in terms of the *Purposes clause* set out in section 2, but it is also a requirement of statutory trusteeship, to the extent that the management of water must promote sustainable development.[9] However, neither the National Water Act, nor the Water Services Act define sustainable development and in this respect, the definition contained in the National Environmental Management Act (the 'NEMA') may be useful.

The NEMA requires the implementation of sustainable development, through the 'integration of social, economic and environmental factors into planning, implementation and decision-making so as to ensure that development serves present and future generations'.[10] Sustainable development, as envisaged by section 24(b)(iii) of the NEMA, requires that natural resources must be used and developed in such a way that also takes into account 'justifiable economic and social development'.[11] The requirements of sustainable development allow for a balancing act between competing environmental goals and socio-economic considerations.[12] However, the exact content of these competing considerations is left open to the discretion of decision-makers.

The courts have had occasion to consider the importance of sustainable development in the South African legal sphere. The Supreme Court of Appeal held that sustainable development lies at the heart of the principles of

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'Everyone has the right –

(*b*) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that—

(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

[8] S 2(a), (b), (d) and (e).

[9] S 3 read with s 2.

[10] S 1 definition of sustainable development.

[11] *BP Southern Africa (PTY) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs* 2004 (5) SA 124 (W) ('*BP*') 143.

[12] It has been argued above at 2.1 that this aspect of sustainability tempers the constitutional right to an environment that is not harmful to well-being, a fairly broad right.

environmental governance in *MEC for Agriculture, Conservation, Environment and Land Affairs v Sasol Oil (Pty) Ltd and Another*.[13] This was further reiterated by the Constitutional Court, where it posited that the future of environmental jurisprudence would be built on the concept of sustainable development, as this formed the bedrock of all modern environmental law.[14] The importance of sustainable development has thus been recognised by the Courts.

Sustainability requires that development must take place such that it 'meets the needs of the present without compromising the ability of future generations to meet their own needs'.[15] Sustainability at its core, therefore, seeks to achieve two primary goals. The first is to provide for the 'basic needs of humanity'.[16] The second goal is to ensure that development takes place within this context based on the limits of society, technology and environmental capacity.[17] Both these requirements highlight the anthropocentric approach of sustainability, that is, the fact that the needs of people are placed at the forefront of these considerations.[18]

Development entails the modernisation of society – whereby a less developed nation or society seeks to progress to the state of a developed country, or an already developed country furthers its development. Development in this respect can be seen as the intentional 'social and material' improvement to the quality of life for people. From a philosophical perspective, development results in

[13] 2006 (5) SA 483 (SCA) 15.

[14] *BP* 144; See also J Glazewski 'Environment' in Cheadle et al *South African Constitutional Law: The Bill of Rights* (2002) 423.

[15] Definition provided by the Bruntland Commision (1983) as discussed in J Glazewski *Environmental Law in South Africa* (2000) 14; *HTF Developers (PTY) Ltd v Minister of Environmental Affairs and Tourism and Others* 2006 (5) SA 512 (T) 16; M Kidd 'Environmental law' (1993) 4 *South African Human Rights Year Book* 123; J J Walmsley 'Framework for measuring sustainable development in catchment systems' (2002) 29 *Environmental Management* 195. It has been said that 'sustainability can mean any important change in values, public policy, and public or private activity that moves communities, and individuals, toward realization of the key tenants of ecological integrity, social harmony, and political participation' - see H Bressers and W A Rosenbaum *Achieving Sustainable Development* (2003) 5.

[16] M Kidd (note 1 above) 301; M Kidd (note 15 above) 123.

[17] M Kidd (note 1 above) 301. See also the definitions of sustainability provided by G Jewitt 'Can Integrated Water Resources Management sustain the provision of ecosystem goods and services?' (2002) 27 *Physics and Chemistry of the Earth* 889.

[18] D A McDonald *Environmental Justice in South Africa* (2002) 3.

improving society generally, and thus causing a shift towards a 'good society'. Development can also be seen as something inevitable - the movement of human change along an unpredictable, indefinite timeline.[19] Whilst these definitions allow for sustainability to be viewed from different perspectives, they do not really give an indication of what is practically required to give effect to the principle of sustainability.

The rhetoric of sustainable development has been around for decades and many countries have adopted the terms in their policies.[20] Despite this, it has been suggested that sustainability in practice is a 'myth' when the rate at which resources are being consumed, depleted and destroyed is taken into account.[21] Further, it has been argued that since its introduction by the Brundtland Commission in 1987, it has failed to be defined adequately,[22] and has instead been adopted by corporations as a smoke-screen behind which to hide.[23] The reality is that sustainability may be difficult to implement in practice because it consists of concepts that 'are not properly defined and operationalised' and there are no guidelines for the assessment of sustainability.[24]

In South Africa, despite the importance of this concept being acknowledged by the courts, the practical implementation thereof is poor. The vagueness of sustainability can potentially be cured through the introduction of sustainability indicators, as required by Agenda 21, with the purpose of providing more user-

[19] G Wilson 'Making the connections between environment, development, and sustainability' in G Wilson, P Furniss and R Kimbowa (eds) *Environment, Development and Sustainability* (2010) 4.

[20] C M Figuères, J Rockström, C Tortajada (eds) *Rethinking Water Management* (2003) 9; L J Kotzé 'Environmental governance' in A Paterson and L Kotze (eds) *Environmental Compliance and Enforcement in South Africa* (2009) 103.

[21] J Wilsenach 'A sustainability approach to water and sanitation' in *The Sustainable Water Resource Handbook* (2009) 17.

[22] J Wilsenach (note 21 above) 18. See also E T Freyfogle *Why Conservation is Failing and How it Can Regain Ground* (2006) 114 – 124.

[23] J Wilsenach (note 21 above) 18.

[24] C M Figuères, J Rockström, C Tortajada (note 20 above) 9. G F Maggio 'Inter/intra-generational equity: Current applications under international law for promoting the sustainable development of natural resources' (1996 - 1997) 4 *Buffalo Environmental Law Journal* 171.

friendly information to facilitate the decision-making process.[25] The United Nations agreed to Agenda 21 in 1992, which is effectively an 'action plan' for the implementation of sustainable development.[26] Agenda 21, as reinforced by the World Summit on Sustainable Development and adopted by South Africa,[27] specifically requires the development of 'strong institutions' as well as enforcement mechanisms, in order to ensure compliance with environmental obligations.[28] These indicators must be based on scientific and internationally recognised methods.[29] The information should be easily understood by the user and conveyed in a manner that is useful to a decision-maker, for example, by expressing a trend.[30] Factors that would be appropriate to monitor in South Africa include access to water, availability of water, the distance to an available water supply and the costs to access water.[31]

[25] In order to achieve the goals set out in Agenda 21, s 26(2) of the National Environmental Management Act requires the Department of Environmental Affairs and Tourism to publish an 'Annual Perfomance Report on Sustainable Development'. See in this respect E Bray 'Administrative justice' in A Paterson and L Kotzé (eds) *Environmental Compliance and Enforcement in South Africa* (2009) 199; J J Walmsley (note 15 above) 196; G Morrison, OS Fatoki, E Zinn et al 'Sustainable development indicators for urban water systems: A case study evaluation of King William's Town, South Africa, and the applied indicators' (2001) 27 *Water SA* 219; P Mukheibir and D Sparks 'Water resource management and climate change in South Africa: Visions, driving factors and sustainable development indicators' (2003) *Report for Phase I of the Sustainable Development and Climate Change Project* 13. For example, the Water Research Commission has suggested the use of economic indicators in order to assess which areas to prioritise for restoration. See Water Research Commission 'Determining the economic risk/return parameters for developing a market for ecosystem goods and services following the restoration of natural capital: A systems dynamic approach' (2014).

[26] T Field 'Public participation in environmental decision-making: *Earthlife Africa (Cape Town) v Director General: Department of Environmental Affairs and Tourism*' (2005) 122 *South African Law Journal* 761.

[27] The Rio Declaration on Environment and Development as well as Agenda 21 were confirmed at the 17th plenary meeting of the World Summit on Sustainable Development (the 'Johannesburg Summit on Sustainable Development') on 4 September 2002.

[28] F Craigie, P Snijman and M Fourie 'Dissecting environmental compliance and enforcement' in A Paterson and L Kotze (eds) *Environmental Compliance and Enforcement in South Africa* (2009) 47.

[29] J J Walmsley (note 15 above) 196.

[30] J J Walmsley (note 15 above) 196; G Morrison, OS Fatoki, E Zinn et al (note 25 above) 219; P Mukheibir and D Sparks (note 25 above) 13; J J Walmsley, M Carden, C Revenga et al 'Indicators of sustainable development for catchment management in South Africa – Review of indicators from around the world' (2001) 27 *Water SA* 547.

[31] See P Mukheibir and D Sparks (note 25 above) 17; J J Walmsley, M Carden, C Revenga et al (note 30 above) 547.

Practically, Wilsenach has offered four suggestions as to how to ensure the sustainability of water.[32] In the first instance, the quality of water must be maintained. This includes the management of both how water is supplied (to prevent its depletion) as well as how it is safe-guarded against depletion. The second factor entails reducing the pollution found in water, particularly nutrients that are harmful to water systems (causing eutrophication and other forms of catastrophic pollution).[33] Eutrophication has been named as one of the biggest threats to South Africa's water supply.[34] The first two suggestions can be facilitated by repeated monitoring and acquiring current information pertaining to the quality and pollution levels of water sources.[35] The third practical suggestion relates to the development of technology to manage water properly.[36] The final suggestion is the development of skills in the industry.[37] As will be seen below, all four of these suggestions have been highlighted by the Strategy as focus areas for improvement.

Environmental protection does not require environmental preservation in its exact condition as the concept of sustainable development allows deviation where there are legitimate developmental goals.[38] The deterioration of the quality of the environment may be justifiable in certain circumstances, and sustainable

[32] The fifth suggestion relates to the production of energy using water and is not directly relevant for the purposes of this discussion. J Wilsenach (note 21 above) 21 – 22.

[33] J Wilsenach (note 21 above) 38.

[34] M Kidd (note 1 above) 94. Eutrophication occurs where naturally occurring nutrients such as phosphorous and nitrogen are released into the water resource in excessive quantities. This has the result of increasing the algae growth in the water source, and permanently changes the functioning ecosystem of that source. See W Harding 'Eutrophication threats to surface water quality in South Africa' in *The Sustainable Water Resource Handbook* (2011) 37; R D Walmsley 'Perspective on eutrophication of surface waters: policy/research needs in South Africa' (2000) *Report to the Water Research Commission* 4.

[35] See discussion below at Ch 6 (note 64 below).

[36] Wilsenach speaks specifically about the development of technology in the context of separating different types of water effluent. See J Wilsenach (note 21 above) 17; B Schreiner, G Pegram and C von der Heyden 'Reality check on water resources management: Are we doing the right things in the best possible way?' (2009) 11 *Development Planning Division (Working Paper Series)* 9.

[37] J Wilsenach (note 21 above) 22.

[38] S 24(b)(iii). Protection in the context of water is defined in the Act as the 'maintenance of the quality of the water resource to the extent that the water resource may be used in an ecologically sustainable way; the prevention of the degradation of the water resource; and the rehabilitation of the water resource.

development does not seek to ensure that the environment remains in a vacuum. For example, non-renewable resources such as petroleum are finite. Once petroleum resources are depleted, they cannot be replenished. However, in undertaking the cost-benefit analysis of such a process, the state may find that the cost to the environment in depleting petroleum reserves is outweighed by the benefits to society and the economy through the consequential financial and infrastructural gains. Thus, the key is to evaluate to what extent destruction, depletion and pollution of resources can be justified for social and economic goals.[39] In this respect, it is important to view the status of natural resources within the context of 'landscapes under constant change, emerging as the outcome of dynamic and variable ecological processes and disturbance events, in interaction with human use'.[40] It is also important to recognise that there are a number of factors that influence not only environmental changes, but also societal changes, and that the two cannot be viewed in a linear relationship in isolation of each other.[41] This is why a holistic, system-centric approach to decision-making is more appropriate in this context, as will be discussed in Chapter 6.[42]

While a certain level of degradation of the environment may be necessary to further social and economic development, sustainability can only be achieved if there is an environment that can benefit society and the economy.[43] If there are no resources to adequately satisfy the needs of society, the goals of sustainable development will fail. Consequently, the goals of development must function together with the goals of environmental protection and preservation.[44] The

[39] H Thompson *Water Law: A Practical Approach to Resource Management and the Provision of Services* (2006) 200 – 201.

[40] M Leach, R Yearns and I Scoones 'Challenges to community-based sustainable development' (1997) 28 *IDS Bulletin* 7. See also Ch 6 (note 66 below).

[41] M Leach, R Yearns and I Scoones (note 40 above) 7.

[42] See Ch 6 (note 14 below).

[43] G E Devenish *A Commentary on the South African Bill of Rights* (1999) 326.

[44] G Jewitt (note 17 above) 888.

interdependence of environmental preservation and social well-being has been acknowledged by the courts.[45]

However, it does appear that where large-scale developments are planned that could impact the environment, a privileged, well-organised minority is able to resist these developments.[46] There are a number of examples in South Africa where this has occurred with the result that the poor, who favour development, are seen as anti-environment, while those who resist development are perceived as 'anti-development, regardless of the cost to the poor'.[47] The most recent arena where this battle has played out has been in the Karoo, where the multinational Shell has applied for the mining rights to commence fracking activities.[48] While economic development is necessary in this region, the motivations of the state to award the licence have been called into question.[49]

Within the context of sustainability, there are a number of principles that seek to protect the environment, promote conservation,[50] and prevent, minimise and reverse the effects of pollution. The state, in particular, must ensure that the environment is preserved and protected, and environmental degradation and pollution are avoided, minimised and/or remedied.[51] Environmental principles that

[45] *Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others* 2007 (10) BCLR 1059 (CC) para 102; *MEC: Department of Agriculture, Conservation and Environment and another HTF Developers (Pty) Limited* 2008 (4) BCLR 417 (CC) para 60.

[46] D A McDonald (note 18 above) 38 – 39.

[47] D A McDonald (note 18 above) 39.

[48] E Cropley 'Karoo fracking: Water, wealth and whites' *Mail and Guardian* 28 October 2013; P Burkhardt 'Fracking: Shell SA's shale drive riles farmers' *Mail and Guardian* 27 August 2013. Note also the comments of the Department of Mineral Resources *Report on Investigation of Hydraulic Fracturing in the Karoo Basin of South Africa* (2012) 53 - 55, which states that the economic impacts of hydraulic fracturing may have the unintended results of increasing property prices, forcing locals out of the market and exacerbating socio-economic conditions, particularly if the specialised skills required have to be sourced from labour sources.

[49] T Taylor 'Fracking system "open to abuse"' *The Citizen* 4 September 2013.

[50] S 2(c) of the Act. Conservation is defined in s 1 as the 'efficient use and saving of water, achieved through measures such as water-saving devices, water efficient processes, water demand management and water rationing'.

[51] Pollution is defined in the Act as the 'direct or indirect alteration of the physical, chemical or biological properties of a water resource so as to make it less fit for any beneficial purpose for which it may reasonable be expected to be used or; harmful or potentially harmful to the welfare,

find application within the context of furthering sustainability include the precautionary principle, the preventative principle and the polluter-pays principle. These are discussed below.

2.1. The Precautionary Principle

The precautionary principle requires that a cautious approach to decision-making must be adopted, and this in turn requires an ongoing assessment of the situation.[52] This risk-averse approach is expressly contained in the NEMA and, while not an express purpose of the National Water Act, this approach is required in terms of the Strategy.[53]A cautious approach must be adopted in particular where there is a scientific uncertainty which could result in environmental harm.[54] However, this principle has the potential to stymie development if administrators are never permitted to take risks. The principle, rather than being absolute, requires a balancing act to be undertaken, where the probabilities of the risk occurring need to be weighed against their potential costs.[55] The court in *BP Southern Africa (PTY) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs* ('BP'),[56] confirmed this principle by stating that administrators are required to take a 'risk-averse and cautious approach about future consequences of decisions and actions taking account of the limits of current knowledge'.[57]

In the *Director, Mineral Development, Gauteng Region and Another v Save the Vaal Environment and Others*[58] case, the court also adopted a cautious approach

health or safety of human beings, to any aquatic or nonaquatic organisms, to the resource quality or to property'.

[52] E Fisher, J Jones and R von Schomberg *Implementing the Precautionary Principle* (2006) 115.

[53] S 4(a)(vii) of the NEMA.

[54] M Kidd (note 1 above) 9.See further at Ch 6 (note 86 below).

[55] M Kidd (note 1 above) 9.

[56] 2004 (5) SA 124 (W).

[57] 150 confirming s 2(4)(a)(vii) of the NEMA. See also *MEC: Department Of Agriculture, Conservation And Environment And Another v HTF Developers* (Pty) Limited 2008 (4) BCLR 417 (CC) para 24.

[58] 1999 (8) BCLR 845 (SCA).

to environmentally sensitive issues. The state was challenged for the award of licences in the context of mineral rights, to which it argued that at the point at which licenses are awarded, no rights have yet to be infringed, as there has not been any negative effect on the environment.[59] The argument the state put forward to support this was that the party applying for a license would still have to provide an acceptable Environmental Management Plan, and as such could acquire no rights prior to so doing.[60] As a result, the state argued that the respondents were premature in their action against it.[61] However, the court disagreed with this argument and held that the award of the license makes it possible for the party to mine upon successful completion of the Environmental Management Plan, thereby creating the *possibility* for 'serious consequences' in the future.[62]

2.2. The Preventative Principle

One of the main features of environmental protection is to avoid damage to the environment in the first place.[63] This is termed the preventative principle which aims to prevent any environmental damage from occurring.[64] However, as Kidd observes, this is more of a Utopian goal than a practical reality, as economic and social development will necessarily impact the environment.[65] The scope of protection includes not just the water itself, but also the 'aquatic and associated ecosystems and their biological diversity' as per the *Purposes clause* of the Act.[66] In this respect, the state can declare certain activities that may be detrimental to a water source to be controlled activities.[67] Once an activity has been declared as a

[59] Para 16.

[60] Para 16.

[61] Para 16.

[62] Para 17.

[63] M Kidd (note 1 above) 11.

[64] M Kidd (note 1 above) 10; H Thompson (note 39 above) 157 – 158.

[65] M Kidd (note 1 above) 9.

[66] S 2(g).

[67] S 37(1). Recently, the Minister of Water Affairs stated the government's intention to have fracking declared a controlled activity and has issued a notice for public comment. See National Water Act GN 863 of 23 August 2013: Proposed declaration of the exploration for and or production of onshore unconventional oil or gas resources and any activities incidental thereto

controlled activity, it may not be undertaken without the requisite authorisation in terms of the Act.[68]

The Water Services Act plays an important role in the conservation of water. Regulations in accordance with the Water Services Act have been implemented which require municipalities to report annually on the available water balance, the quantity of water lost, as well as the nature of the demand management activities and measures undertaken.[69] The Department of Water Affairs has undertaken a study to ascertain what targets to establish for the reduction in water loss and demand. This study has so far focused on the major metropolitan areas, such as Cape Town, where specific goals of reducing water demand by 20% have been established through the implementation of a long-term Strategy.[70] The WSA also requires water service authorities to enact bylaws that prevent the unlawful use and waste of water.[71]

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including but not limited to hydraulic fracturing as a controlled activity. F Parker 'Frackers will need to apply for a water licence, says Molewa' *Mail and Guardian* 3 September 2013.

[68] S 37(2). Controlled activities must be licenced in terms of National Water Act GN 519 of 6 May 2009: Notice to register a water use in terms of s 21(e), (f), (h) and (j) of the Act (ie engaging in a controlled activity, discharging waste or water containing waste, disposal of water in a manner that could detrimentally impact on a water resource, disposing of water which contains waste from industrial/power generating process, and removal, discharge or disposal of underground water where necessary for safety of people). But see also National Water Act GN 399 of 26 March 2004: Revision of general authorisations in terms of section 39:

1. Engaging in controlled activity, identified as such in s 37(1): Irrigation of any land with waste or any water containing waste generated through an industrial activity or by a waterwork, which exempts certain irrigation activities from the ordinary licencing requirements;
2. Discharge of water or waste containing water into a water resource through a pipe, canal, sewer, or other conduit; and disposing in any manner of water which contains waste from, or which has been heated in, any industrial or power generating process, which exempts certain water discharge activities from the ordinary licencing requirements.
3. Disposing of waste in a manner that may detrimentally impact on a water resource, which exempts the disposal of waste activities from ordinary licencing requirements.

[69] Reg 11 of GNR 509 of 8 June 2001: Regulations relating to compulsory national standards and measures to conserve water. Strategy (2013) 53.

[70] Strategy (2013) 54.

[71] S 21(g) of the Services Act.

Where the possibility of the protection of the resource is not possible, this principle aims to reduce or mitigate the harm, and remedy any past harm.[72] The National Water Act specifically requires the reduction and prevention of pollution and degradation of water resources.[73] The rhetoric of these concepts is such that where the preservation of the resource is not possible, the effects of destruction or damage must, firstly, be minimised and secondly, be remedied.[74] The legislation does not require that the effects are *either* minimised or remedied. Rather, it requires that both are fulfilled. These requirements apply to the preservation of ecosystems and biological diversity, the avoidance of pollution and degradation of the environment, as well as the protection of the nation's cultural heritage.[75]

There are a number of mechanisms in the Act that aim to facilitate the protection of the environment, and the prevention or minimisation of pollution. For example, a responsible authority can prescribe conditions for the award of a license for the use of water.[76] These conditions can set out the requirements for the protection of the resource, impose monitoring criteria, and prescribe the ways in which the pollution of water is to be addressed.[77]

Evidently, many municipalities are failing to ensure the protection and preservation of water. A recent study undertaken by the National Water Research Commission found that some of the rivers in South Africa, many of which are the primary source of water for irrigation of agricultural produce, contain E.coli bacteria 10 000 times higher than that allowed by the World Health Organisation, as well as the Department of Water Affairs' own standards. The consequences of this could be catastrophic for South Africa's export economy as this could result

[72] M Kidd (note 1 above) 11.

[73] S 2(h).

[74] S 4(a)(i), (ii) and (iii).

[75] For further information on the various models of pollution monitoring [Uniform Effluent Standards Approach (which monitors acceptable levels of effluent in water sources), the Receiving Water Quality Objectives Approach (which specifies the acceptable quality of water returned to the environment) and the Pollution Prevention Approach (which focuses on levels of pollutants being returned to water resources)] see H Thompson (note 39 above) 156 - 158.

[76] S 29.

[77] S 29.

in the suspension of international trade of fruit and vegetables. More alarming is the fact that contact with this water, even if accidental, could cause death.[78]

The Strategy, however, does assert that the quality of drinking water and wastewater discharge at a municipal level has substantially improved since the implementation of the Blue and Green Drop Programmes.[79] The Blue Drop Report is a compulsory certification programme aimed at incentivising the performance of municipalities by scoring them on a number of areas, including the quality of the available drinking water and the management performance of the municipality.[80] Despite this, many areas still struggle to provide clean drinking water, often as a result of effluent pollution.[81]

The cause of this pollution is twofold: a lack of proper sanitation in informal settlements results in faecal and other pollution landing up in rivers; and the poor management of water treatment plants results in raw sewage leaking into rivers.[82] The Strategy makes it clear that, at a national level, the state is aware of the impacts of malfunctioning and inadequate wastewater treatment works on water quality.[83] Other threats posed to the water quality, as acknowledged by the Strategy include eutrophication, microbial contamination, salinisation, toxicants, altered flow regime, acid mine drainage, metal contamination, radioactivity, urban rivers and agro-chemicals.[84]

The Strategy has highlighted the urgent need to address the pollution of water resources. In this respect, the Strategy aims to rehabilitate polluted catchment areas, clear invasive alien plants in water resources (which cause algae growth and

[78] S Mouton 'Human waste in rivers used to irrigate crops' *Times Live* 12 August 2013. See also M Soloman 'Farmers express fear over toxic water' (2013) *Daily Dispatch.*

[79] Strategy 70. The latest available Blue Drop Report (2012) is for the January to December 2011 period. See Department of Water Affairs *Blue Drop Report* 2012.

[80] See Department of Water Affairs *Blue Drop Report* 2012.

[81] Strategy 72; M Faure and W du Plessis (note 5 above) 417.

[82] S Mouton (note 78 above).

[83] Strategy (2013) 39.

[84] Strategy (2013) 41.

eutrophication) and treat mine water.[85] Despite the legislative requirements and a number of programmes that have been implemented by the state to ensure the protection and preservation of water and water ecosystems, there has been a 'demonstrable drop in the aquatic ecosystem health across the country and increased stress on water resources'.[86] The latest Strategy shows that 60% of South Africa's river ecosystems are threatened.[87] In addition, as many as 48% of wetland ecosystems are, as a result of pollution, critically endangered.[88] The weakness in the approach to the protection of water resources is not in the mechanisms that have been adopted, but rather, the implementation of these mechanisms.[89] This is clearly a breach of the duties of trusteeship, particularly the duty to prevent and minimise pollution and, more broadly, to ensure sustainable development of the resource. Not only does it not adequately protect the environment, but these statistics show that society is prejudiced by this state of affairs as a result of the dramatically impaired quality of the available water supply. Either the water used for crop production is essentially poisoned, or the polluted water requires great levels of treatment before it is safe for human consumption at great cost to the state and, ultimately, the taxpayer.

At a national level, to curb the pollution and destruction of water resources, three areas have been highlighted by the Strategy. The first is the implementation of the National Freshwater Priority Areas, which aims to scientifically identify a proportion of ecosystems as priority areas, which are then all recorded in a central database.[90] The purpose of this database is to assist decision-makers and planning processes.[91] The second proposal is more clearly to ascertain and then enforce buffer zones around water sources.[92] These buffer zones form an important barrier

[85] Strategy (2013) 7.

[86] Strategy (2013) 37.

[87] Strategy (2013) 30.

[88] Strategy (2013) 30.

[89] Strategy (2013) 37.

[90] Strategy (2013) 37 – 38.

[91] Strategy (2013) 37 – 38.

[92] Strategy (2013) 38.

between land use activities and water sources.[93] Finally, the rehabilitation of ecosystems that have already suffered damage is a priority area in terms of the Strategy.[94] This threefold approach is consistent with the precautionary principle.

The renewal of these ecosystems has secondary benefits to the extent that the renewal projects create jobs in the region, and opportunities for cooperation between local communities and government.[95]

In the context of future economic development goals, the Strategy highlights the importance of appreciating the value of water conservation, in all economic sectors, and demand reduction strategies for water use must be implemented accordingly.[96] The Strategy aims to reduce water loss through the implementation of water demand reduction, more particularly, Water Conservation and Water Demand Management (WCWDM).[97] This is focused not only on the state at a municipal level, but also on the private sector in the context of the agricultural, mining, industrial and energy sectors.[98]

In the municipal sector, these targets have been fixed and the focus of the Strategy is to ensure that they are implemented. To this end, the Strategy requires municipalities to report on a quarterly basis, the content of which must relate to the management activities undertaken as well as the quantifiable reduction in water losses.[99] In the mining, energy and industrial sectors, targets have not yet been established, as each different activity will have different water requirements.[100] The focus of this Strategy is, therefore, to ascertain the targets for each type of activity.[101] Finally, a reduction in the demands of the agricultural

[93] Strategy (2013) 38.

[94] Strategy (2013) 38.

[95] Strategy (2013) 38.

[96] Strategy (2013) 53.

[97] Strategy (2013) Ch 7.

[98] Strategy (2013) 54 – 56.

[99] Strategy (2013) 58.

[100] Strategy (2013) 58.

[101] Strategy (2013) 58.

sector will be addressed through the setting of targets and the priority in this regard is to measure the water uses in this sector.[102]

2.3. The Polluter-Pays Principle

The third principle aimed at promoting environmental protection and preservation within the context of sustainability is the polluter-pays principle.[103] As discussed above, damage to the environment negatively affects the potential for development by depleting or diminishing the quality of an available resource. Pollution and overuse of water has consequences for sustainable development, in that there is ultimately less water available to promote other social and economic goals. The polluter-pays principle is relevant here, as it requires that the person responsible for environmental damage should also bear the financial consequences thereof.[104] This principle is confirmed by the NEMA, as it requires that any pollution, environmental degradation or adverse effects on the health of parties is the financial obligation of the responsible party.[105] This includes the financial expenses for either preventing and controlling or minimising these effects.[106] The principle is thus comprised of both a preventative as well as a reactive component.[107]

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[102] Strategy (2013) 58.

[103] N de Sadeleer *Environmental Principles: From Political Slogans to Legal Rules* (2005) 21; L Ferris 'The public trust doctrine and liability for historic water pollution in South Africa' (2012) 8/1 *Law, Environment and Development Journal* 3.

[104] The principle was adopted in 1974 by the Organisation for Economic Cooperation and Development – see M Kidd (note 1 above) 7; T Field (note 26 above) 761.

[105] S 28 of the NEMA. However, see L J Kotzé (note 20 above) 113 who shows that the extent to which the NEMA is applicable in the context of water law remains uncertain. However, T Winstanley 'Administrative measures' in A Paterson and L Kotzé (eds) *Environmental Compliance and Enforcement in South Africa* (2009) 230 suggests that the NEMA is 'sufficiently widely framed' for it to find application in the context of water resources.

[106] S 4(2)(p). For example, in Pretoria, residents have been complaining that their water is contaminated with Benzine for a number of years. Benzine, if ingested, can be fatal. The Department had allegedly identified and remedied the problem, caused by a leaking filling station, in 2011. However, in November 2012 the problem was again reported to the Department, and it was their intent to 'issue a warning to the polluter'. SAPA 'Benzine contaminates Pretoria water' *News 24* 10 April 2013.

[107] See also M Kidd (note 1 above) 8, who comments that the NEMA and other South African legislation dealing with the polluter-pays principle does not do so sufficiently.

The National Water Act implements measures targeted at preventing pollution and addressing emergency incidents.[108] The onus in these situations is on the party who has caused or is likely to cause pollution to take control of the situation.[109] However, where the responsible party, owner or person in control fails to do so, the catchment management agency is given the discretionary power to issue a directive to this party.[110] Failure to comply with this directive entitles the agency to implement any measures that it deems necessary under the circumstances and recover the reasonable costs from the responsible party, owner or controller of the land, or any other negligent party involved.[111] The agency may also claim from any party who benefitted from the failure to prevent the pollution, to the extent of that benefit.[112] However, it is not a prerequisite for the agency to act where a private party fails to do so, and consequently this approach is largely reactive.

While the Minister and agencies may take a reactive approach to pollution after it has occurred, the polluter-pays principle can also be used in a preventative manner to prevent pollution from occurring. For example, the Strategy aims to incentivise water reduction practices on the basis of the polluter-pays principle by implementing a waste discharge charge system.[113] The waste discharge charge system will incorporate two charges or levies on water use, with the goal of encouraging consumers to reduce their water consumption. The first charge (the Waste Mitigation Charge) will be set up to cover the administrative costs of addressing the negative impacts of waste discharge.[114] The second charge (the Waste Discharge Levy) will be charged proportionate to the amount of water utilised by a person, to deter water wastage.[115] At present, this system is being

[108] See Ch 4 and 5 of the Act.

[109] S 19(1) and (2) in the context of pollution generally; s 20(1) – (4) in the context of emergency incidents.

[110] S 19(3); s 4(d) read with s 5; See Ch 3 (note 260 above); T Winstanley (note 105 above) 226 – 228.

[111] S 19(4) and (5); s 6, 7 and 8.

[112] S 19(6) read with s 19(7).

[113] Strategy 87.

[114] Strategy 87.

[115] Strategy 87.

established in three catchment areas, namely the Upper Crocodile River West, the Upper Vaal River and the Upper Olifants River.[116]

In the context of acid mine drainage, which remains a major source of pollution of water,[117] one of the aims of the Strategy is to pursue private individuals for remuneration in accordance with the polluter-pays principle, where an identifiable owner still exists.[118] However, it is typically the case that much of the mining activity that originally caused the pollution took place many decades ago, making it difficult to identify the original culprits of the pollution, or hold them accountable in terms of the prior legislative regime.[119] Because of the urgency of the situation and the difficulty in tracing the parties guilty of causing the pollution, the state has had to finance and install a system to prevent this acid mine water from contaminating Johannesburg's water supply.[120]

In an extreme example, the state has, to some extent, applied this principle against itself. The Department of Water Affairs has reported the municipality of Stellenbosch to the National Prosecuting Authority, which is now considering instituting criminal charges against the municipality. This is after the municipality failed to treat the pollution of the river that runs through the town, which has grown worse for over a decade. The pollution has been caused by inadequate sewage facilities, and poses a health risk to both the users of the water for domestic consumption as well as farmers who use the water for irrigation.[121]

[116] Strategy 87 and 90.

[117] Strategy 72.

[118] Strategy (2013) 26.

[119] L Ferris 'The public trust doctrine and liability for historic water pollution in South Africa' (2012) 8/1 *Law, Environment and Development Journal* 1 - 2. See in this respect the interview conducted by Carte Blanche with John Munro, the CEO of Rand Uranium (2010).

[120] At present, a number of pump stations and treatment works are under construction in the Gauteng region. They are being developed at a cost of R2.2 billion under the project name 'Acid Mine Drainage (Phase 1): The implementation of emergency works in the Witswatersrand gold fields to protect the environment. Both are due to be completed by 2014. See Strategy (2013) 34 – 35.

[121] J Cronje 'NPA may act over Cape river pollution' *IOL* 3 May 2013.

Another component of responsibility in the environmental context pertains to what is termed the 'life cycle responsibility'.[122] Where a person or entity has introduced a dangerous substance, component or situation to the environment, that party is responsible for it until it is disposed of and remedied.[123]

3. Equity

The goals of water management in terms of equity are encapsulated both in the trusteeship provision and the *Purposes clause* of the National Water Act, as well as the preamble to the Water Services Act. The National Water Act requires that the basic human needs of present and future generations must be met, 'equitable access to water' must be promoted, and finally, that the 'results of past racial and gender discrimination must be redressed'.[124] In addition to the *Purposes clause* of the National Water Act, the NEMA requires that both renewable and non-renewable resources must be used responsibly. The use of non-renewable resources must be equitable, also taking into account the 'potential depletion of the resource'.[125] It is therefore necessary to discuss these aspects of equity to establish what trusteeship entails.

In view of the political history of South Africa, the promotion of equitable access to water resources must favour vulnerable and disadvantaged groups. There is a large overlap between equality and dignity, and equality and access to water.[126] Equality in the Constitution cannot be interpreted to mean that there is a right to an equality of goods, as this would be an impossible task to realise.[127] Instead, it means that, at the very least, everyone should be afforded the same rights, even though the practical realisation of these rights may differ. This right recognises

[122] M Kidd (note 1 above) 11.

[123] M Kidd (note 1 above) 11.

[124] S 2(a) – (c) of the National Water Act.

[125] S 4(a)(v).

[126] A Chaskalson 'The third Bram Fischer lecture: Human dignity as a foundational value of our constitutional order' (2000) 16 *South African Journal of Human Rights* 202.

[127] A Chaskalson (note 126 above) 202; H Thompson (note 39 above) 176 – 179.

that state intervention is necessary to distribute resources more equally such that basic needs can be met.[128] Given the inequality of access to resources prevalent in the South African society, the state's duty to realise the rights of South Africans progressively in the context of basic needs means not only giving effect to an 'equality of rights but also equality of dignity'.[129]

As will be discussed below, the promotion of equality in the context of access to water will also further the goals of human dignity. To this end, the Water Allocation Reform Programme sets aside water for allocation to previously disadvantaged groups.[130] It aims to redistribute water by 2024 such that 60% of available water is in the hands of the black population, and 55% percent of water is held by women to further the goals of racial and gender redistribution.[131] The current national target is for 30% of water to be 'in the hands of South African black and women citizens'.[132] This is consistent with the National Water Policy Review, which aims to reform the governance of water, and focuses on the provision of water, services and the associated benefits on an equitable basis.[133]

The Strategy states that this is the 'decade for equity and redistribution'.[134] The Strategy aims to ensure that there is sufficient water for all, as well as sufficient water for economic growth and development.[135] It consequently aims to fulfill the constitutional right of access to water, whilst taking into account the requirements of sustainable development. There are three approaches to equity in water management according to the Strategy, namely equity of access to water services,

[128] A Chaskalson (note 126 above) 202. See discussion below at Ch 8 (note 66).

[129] A Chaskalson (note 126 above) 203.

[130] Strategy (2013) 7.

[131] Department of Water Affairs and Forestry *Water Allocation Reform Strategy* (2008) 4 – 5; Strategy; S Movik and F de Jong 'Licence to control: implications of introducing administrative water use rights in South Africa' (2011) 7/2 *Law, Environment and Development Journal* 76; M I Msibi and P Z Dlamini 'Water allocation reform in South Africa: History, processes and prospects for future implementation' (2011) *Report to the Water Research Commission* 36.

[132] Strategy 51.

[133] National *Water Policy* Review (2013) 9.

[134] Strategy (2013) 5.

[135] Strategy (2013) 5.

to the water resources themselves, and to the benefits accrued from water development.[136]

To remedy the inequality of access to water, the principles of inter-generational and intra-generational equity are central, as they aim to ensure not only equal access to resources between current users, but also for future users of water. In addition, human dignity is central to the right of access to water. This section will therefore discuss inter- and intra-generational equity, human dignity, access to water resources and the beneficial use of water in the public interest.

3.1. Inter- and Intra-Generational Equity

Inter-generational equity requires the use and development of natural resources that factors in the needs of both present and future generations.[137] Present generations must not only use and manage the environment to benefit themselves, but also ensure that the environment is capable of being enjoyed by future generations.[138] As a result, a balance must be struck between the consumptive demands of the present generation, as against the potential needs of future generations.[139] The achievement of inter-generational equity also promotes and facilitates the realisation of sustainability.[140]

Intra-generational equity, on the other hand, requires the fair utilisation of resources between both local and global members of the present generation.[141]

[136] Strategy (2013) 7.

[137] S 24(b) of the Constitution and s 2(a), 9(h) of the Act. Inter-generational equity has been specifically endorsed by the Court in the *BP Southern Africa* case at 143D and *Fuel Retailers Association of Southern Africa* para 75 and 103. It was also implemented by the court in *In re Kranspoort Community* 2000 (2) SA 124 LCC para117. See further J Glazewski (note 4 above) 1-22 ff; L Ferris (note 5 above) 142 – 143; R Ramlogan *Sustainable Development: Towards a Judicial Interpretation* (2011) 244 – 245.

[138] P J Badenhorst, H Mostert and M Dendy 'Minerals and Petroleum: environmental rights' (2007) 18(2) *LAWSA* para 36; M Faure and W du Plessis (note 5 above) 416; K Bosselmann 'Ecological justice and law' in B J Richardson and S Wood (eds) *Environmental Law for Sustainability* (2006) 150.

[139] G F Maggio (note 24 above) 162. The Strategy (2013) 29 indicates that many parts of South Africa will face water shortages as supply outstrips demand.

[140] L Ferris (note 5 above) 143.

[141] G F Maggio (note 24 above) 163 – 164.

Intra-generational equity is also required by the Constitution and the Act, and is expressed in the form of the promotion of equality.[142]As has been stated, the Constitution employs the notion of substantive rather than formal equality,[143] which allows for differentiated treatment of parties, depending on the social and economic context in each case.[144]

The Act's goals to eliminate the effects of past racial and gender discrimination are promoted by the implementation of substantive equality.[145] In this regard, emphasis is placed on the role of women, the youth and other vulnerable parties,[146] whose participation must be ensured. One of the practical ways in which this is done is to require that the responsible authority must, prior to issuing a license or award, consider the need to redress past racial and gender discrimination.[147] Similarly, catchment management agencies, in the exercise of their functions, are directed to 'be mindful of the constitutional imperative to redress the results of past racial and gender discrimination and to achieve equitable access for all'.[148] Should the Minister wish to appoint additional members to the governing body of a catchment management agency,[149] this must be done in a way that would ensure adequate representation of the community, particularly where the community has suffered racial and gender prejudice.[150] It must also serve to achieve sufficient gender and demographic representation.[151] In

[142] S 9 of the Constitution: S 2(b) of the Act.

[143] *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) 41. I Currie and J de Waal (note 19 above) 213 – 214.

[144] I Currie and J de Waal (note 19 above) 213 – 215; W Amien and M Paleker 'Equality' 8 *South African Human Rights Year Book* 321 (1997 – 1998) 322; G E Devenish (note 43 above) 37 – 39.

[145] See H Thompson (note 39 above) 138 and 175 – 179. On the struggles still faced in terms of ensuring gender representation, see M I Msibi and P Z Dlamini (note 131 above) 115.

[146] The Strategy (2013) 13, for example, highlights the focus of creating jobs for women and the youth. S 2 of the National Water Act requires water management to redress the 'results of past racial and gender discrimination'. For a discussion on the interrelationship between equality and gender, as well as other disadvantaged persons, see S Liebenberg (note 12 above) 208 – 210.

[147] S 27(b).

[148] S 79(4)(a).

[149] S 81(10).

[150] S 81(10)(e).

[151] S 81(10)(c) and (d).

addition, where a catchment management agency has acted in a manner that is unfair, inequitable or discriminatory, ministerial intervention is permissible, and a directive may be issued ordering the agency to remedy the action.[152]

Substantive equality is also promoted through the implementation of a pricing strategy, where it is permissible for a responsible authority to differentiate between parties on the basis of the geographic area and nature of the water use, as well as the water users themselves.[153] Another mechanism that is employed is that the Minister may grant financial assistance in the form of a loan, subsidy or grant.[154] Some of the factors that may be considered in doing so are the need for equity, as well as the need to redress the results of past gender and racial discrimination, in the context of the applicant's financial position and the purpose for which the assistance will be used.[155] While the current regulations make provision for financial assistance to the rural sector for the purposes of farming, the Department is currently investigating the possibility of extending this support to other 'water-based rural livelihoods and food-security initiatives'.[156]

One of the primary goals of the Strategy is to promote equality and development, as well as the elimination of poverty.[157] The proposed reform of water legislation intends to align water management to focus on the goals of poverty reduction.[158] The Minister of Water Affairs has acknowledged that water reform thus far has not adequately addressed the goals of equitable redistribution.[159] The Department aims to do this by, *inter alia,* reforming the current water allocation system, and

[152] S 87(1)(b).

[153] S 56(3)(a) read with s 56(4). Strategy (2013) 87.

[154] S 61. See also GNR 1036 of 31 October 2007: Regulations on financial assistance to poor farmers, which provides that financial assistance may be offered to South African farmers from a previously disadvantaged background.

[155] S 61(3). See also H Thompson (note 39 above) 201 – 202.

[156] Strategy (2013) 88.

[157] Strategy (2013) ii.

[158] National Water Policy Review (2013) 9.

[159] LegalBrief 'New legislation will ensure greater equity in water resource allocation' (2013) *LegalBrief Policy Watch.*

extending financial assistance to 'emerging farmers' as well as supporting economic development initiatives.[160]

The Constitutional Court has had occasion to consider substantive equality and the right of access to water. In the *Mazibuko* case, the applicants contended that the implementation of pre-paid meters violated their right to equality and was unfairly discriminatory because it was not also implemented in wealthier, predominantly white suburbs.[161] The policy, however, was not applied in all poor areas occupied by black people.[162] The court undertook the constitutional test to establish whether the discrimination was unfair, which required an analysis of the steps set out in the case of *Harksen v Lane NO and others.*[163] Section 9(3) of the Constitution is the source of the legitimacy of substantive equality, as it provides that discrimination may be permissible provided it is not unfair. The criteria that must be evaluated for the purposes of this enquiry include the group affected, the interests of this group, and the purpose of the discrimination.[164] The court acknowledged the importance of not encroaching on the terrain of legitimate government purposes, particularly given the difficulty of the state's task in addressing and managing socio-economic conditions in South Africa.[165]

The court concluded that the purpose of the policy was legitimate, in that it sought to eliminate large scale water losses in the region.[166] Further, given the ongoing legacy of Apartheid, where large sectors of society are still geographically divided along racial lines, differential treatment may be 'necessary or desirable'.[167] Finally, as to the effect of the policy, the court concluded that the implementation

[160] GNR 1036 of 31 October 2007: Regulations on financial assistance to poor farmers, which provides that financial assistance may be offered to South African farmers from a previously disadvantaged background. Strategy (2013) 88; P Saxby 'Department plans pro-poor amendments to water law' (2013*) LegalBrief Policy Watch*.

[161] Para 148.

[162] Para 149.

[163] 1998 (1) SA 300.

[164] Para 150.

[165] Para 151.

[166] Para 150.

[167] Para 151.

of pre-paid meters, in light of the governmental objectives thereof, did not unfairly discriminate against the applicants.[168] In concluding, the court was careful to point out the legitimacy and importance of substantive equality within a constitutional democracy, and further, the necessity for the courts to respect the authority of government to introduce policies, provided they are lawful and reasonable.[169]

There is clearly a relationship between socio-economic rights and equality, and a transformative Constitution such as South Africa's requires that this relationship be substantively investigated and furthered. Liebenberg discusses the situation where systemic socio-economic inequalities exist, particularly where there are no social policies or programmes to redress this inequality. She argues that in these circumstances, in order to give effect to the transformative goals of the Constitution, the courts must investigate both the cause of action arising from the constitutional provision pertaining to socio-economic rights, as well as the right to equality.[170]

Environmental justice is also a key component of intra-generational equity and substantive equity.[171] Environmental justice is a movement that developed in South Africa after the start of democracy, with the goal of ensuring equal access to natural resources, both in terms of adequate quantity and quality.[172] This is a modern construct that has accompanied the arrival of environmental principles and norms, and refers to the 'distribution of benefits and burdens in a society'.[173] However, similar to sustainability, it has not been adequately defined.[174] It does appear, though, to be primarily based in substantive equity and ensuring fairness

[168] Para 153 – 157. However, see S Liebenberg (note 12 above) 478, who argues that the court failed to place the onus on the state to rebut the presumption of fairness as required by s 9(5).

[169] Para 156.

[170] S Liebenberg (note 12 above) 212 – 213.

[171] K Bosselmann (note 138 above) 150.

[172] D A McDonald (note 18 above) 2.

[173] M Kidd (note 1 above) 298; D Hallowes and M Butler (note 5 above) 52.

[174] M Kidd (note 1 above) 292.

in the context of access to a safe and healthy environment.[175] Glazewski states that 'environmental justice, social justice and sustainable development, which includes socio-economic considerations, are inherently linked'.[176]

Kidd highlights that there are two levels of environmental prejudice in the context of environmental justice. At a macro-level, environmental prejudice occurs between states at an international level.[177] For example, the Southern African Development Countries (SADC) share a number of water resources. If South Africa were to withdraw too much water, or pollute the water, any downstream users would be affected. The micro-level amounts to a prejudice within the community which is the biggest problem in terms of access to water in South Africa.

The devastating impact of a lack of environmental justice was realised at the 'Poverty, Inequality and Environmental Hearings' where impoverished communities were able to express their concerns regarding the environment. From this,

> 'it became clear that the litany of environmental problems which beset the poor, and which are largely the result of apartheid's inequitable, racially based planning, is a long one…Appalling accounts of the misery resulting from being forced to live without hope in conditions of environmental degradation worsened by poverty and unemployment were delivered… These accounts underlined the fact that the major causes of death in South Africa are related to environmental factors such as inadequate sanitation, inefficient (or no) solid waste removal systems, lack of access to clean drinking water, and the siting of polluting industries in close proximity to areas housing the poor'.[178]

[175] See M Kidd (note 1 above) 292 - for a discussion on environmental justice in the United States of America, in the context of eliminating racial inequalities and biases in the context of environmental issues. However, the NEMA indicates that environmental justice is a component of public participation. For one, environmental justice is required by the NEMA in an attempt to ensure that no parties are unfairly discriminated against, particularly vulnerable parties [s 2(4)(c)]. In addition, the NEMA requires that the community must be educated in terms of the environment, in order to ensure their empowerment and well-being [s 2(4)(h)]. D Hallowes and M Butler (note 5 above) 51.

[176] J Glazewski (note 4 above) 1-21.

[177] M Kidd (note 1 above) 298.

[178] F Khan 'Environmental racism and environmental justice' in D A McDonald (ed) *Environmental Justice in South Africa* (2002) 41.

This situation grossly undermines the dignity of those affected and, whilst clean drinking water is now available to most people in South Africa, the lack of adequate sanitation must be addressed.[179] It is also clear that environmental programmes will not be successful if they do not factor in the impact of poverty on the environment. As stated by Khan '[u]nless this issue is faced head on, and a concerted effort is made to balance the needs of the environment with that of the poor, poverty will continue to force the poor into unsustainable living patterns and to perpetuate environmental injustice'.[180]

3.2. Human Dignity

Equitable access to water and human dignity are intimately linked together. As Chaskalson states, the rights in the Constitution are 'rooted in respect for human dignity, for how can there be dignity in a life lived without access to … water'.[181] The inclusion of the idea of a principle of dignity in water management echoes the sentiments of the international arena, as well as the constitutional ideals of South Africa.[182] The right to dignity is a non-derogable founding value of the South

[179] Ndandu, M 'Where basic services are only a pipe dream' in McDonald, D A (ed) *Environmental Justice in South Africa* (2002) 127 – 130 who described the average difficulties associated with toilet and sanitation services in township areas.

[180] F Khan (note 178 above) 42.

[181] A Chaskalson (note 126 above) 204. D du Toit, S Pollard and R Pejan (note 4 above) 5. Similarly, the High Court in *Mazibuko and others v City of Johannesburg and others (Centre on Housing Rights and Evictions as amicus curiae)* [2008] 4 All SA 471 (W) para 124 stated the following:

> Water is life. Life without water is not life. One cannot speak of a dignified existence if one is denied access to water. The right to water is the bedrock of most of the rights contained in the Bill of Rights.

[182] For example, one of the earliest international instruments to adopt the notion of dignity is the Stockholm Declaration, 1972, which required the goals of environmental management to promote dignity. See J Scanlon, A Cassar and N Nemes 'Water as a human right' (2004) 51 *IUCN Environmental Policy and Law Paper* 6; Art 12(1) of the IUCN Draft International Covenant on Environment and Development (1995) requires an environment that promotes dignity; Resolution 2002/6 of the UN Sub-Commission on the Promotion and Protocol of Human Rights on the Promotion of the Realization of the Right to Drinking Water (2002) reaffirms the importance of dignity in the context of the right to drinking water; the Political Declaration of the World Summit on Sustainable Development also highlighted the important link between dignity and the right to water at para 18, Johannesburg Declaration on Sustainable Development, agreed to at the World Summit on Sustainable Development, Johannesburg, South Africa 26 August - 4 September 2002. See also E B Bluemel 'The implications of formulating a human right to water' (2004) 31 *Ecology Law Quarterly* 974. However, see also D Bilchitz *Poverty and Fundamental Rights* (2007) 146 – 149 who sets out the various approaches to dignity within the constitutional context.

African Constitution.[183] It is also a self-standing clause in the Bill of Rights, which provides that 'everyone has inherent dignity and the right to have their dignity respected and protected'.[184] The UN Committee on Economic, Social and Cultural Rights has said that the right to water is a prerequisite for the satisfaction of other human rights, and ultimately a dignified life.[185]

Dignity as a constitutional ideal operates on two different levels in South Africa. Because of its inclusion in the Bill of Rights it is a self-standing justiciable human right. However, it also independently underlies each of the other rights in the Constitution, operating as a value with interpretive weight. Therefore, not only does dignity operate as a human right in and of itself, it also underlies all other rights in the Constitution. Consequently, the fulfillment of any of the rights in the Bill of Rights must seek to ensure that the underlying value of dignity is promoted and ensured.[186]

It has been stated that other rights in the Constitution are 'meaningless' if sufficient water is not made available.[187] There is consequently a large overlap between the principles of dignity and access to water. Practically, the right to dignity will be most important in the context of the provision of sufficient water for human needs such as drinking, cooking, washing and sanitation.[188]

The court had occasion to consider the importance of dignity in the context of the *Mazibuko* decisions.[189] In the first of the series of decisions heard in the Witwatersrand Local Division, *Mazibuko and others v City of Johannesburg and*

[183] S 1; A Chaskalson (note 126 above) 196.

[184] S 10.

[185] J Scanlon, A Cassar and N Nemes (note 182 above) 6; United Nations Economic and Social Council, Committee on Economic social and Cultural Rights, General Comment No 15 (2002). *The right to water (Arts 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)* Twenty-ninth session, Geneva, 11-29 November 2002.

[186] I Currie and J de Waal (note 19 above) 275; G E Devenish (note 43 above) 81.

[187] J Dugard (note 12 above) 596.

[188] H Thompson (note 39 above) 207; D du Toit, S Pollard and R Pejan (note 4 above) 2.

[189] See also the discussion above at Ch 3 (note 76).

others (Centre on Housing Rights and Evictions as amicus curiae)[190] [hereinafter *Mazibuko* (W)], the judgment commenced with the words '[w]ater is life, sanitation is dignity'.[191] The decisions of the High Court and the Supreme Court of Appeal (the 'SCA') found in favour of the applicants and show that dignity played a central role in this enquiry, recognising that without giving effect to the right of access to water, other rights in the Bill of Rights could not be fulfilled.[192] The SCA, in particular, was mindful that the responsibilities of the state were nevertheless limited by its available resources.[193]

The Constitutional Court, however, did not engage with the arguments pertaining to dignity at all.[194] Liebenberg argues that the court should have substantively evaluated whether the amount of water provided was sufficient to meet the daily needs of the community such that their dignity was not infringed. The 'impact' of the restriction 'on their life, health and dignity' had to be considered in addition to whether the City had the resources to make more water available.[195] The earlier decision of the court *aquo* shows a far greater appreciation for the concept of dignity by stating the following:[196]

> To deny the applicants the right to water is to deny them the right to lead a dignified human existence, to live a South African dream: to live in a democratic, open, caring, responsive and equal society that affirms the values of human dignity, equality and freedom. The denial would perpetuate the decades-long poverty, deprivation, want and undignified existence of the recent past. The Bill of Rights guaranteed in the Constitution would, as a result of the denial, remain a distant mirage of unfulfilled dreams. The denial is unconstitutional and therefore unlawful.

[190] [2008] 4 All SA 471 (W) [hereinafter *Mazibuko* (W)].

[191] Para 1 as taken from the Department of Water Affairs *Strategic Framework for Water Services* (2003) i.

[192] *City of Johannesburg and others v Mazibuko and others (Centre on Housing and Evictions as amicus curiae)* [2009] 3 All SA 202 (SCA) [hereafter '*Mazibuko (*SCA)*'*] para 17. See also S Liebenberg (note 12 above) 181.

[193] *Mazibuko (*SCA) para 26.

[194] *Mazibuko and Others v City of Johannesburg* 2010 (3) BCLR 239 (CC) [hereafter '*Mazibuko* (CC)*'*].

[195] S Liebenberg (note 12 above) 468.

[196] *Mazibuko* (W) para 160.

The Constitutional Court instead stated that it was not competent to evaluate what the content of the right entailed and whether sufficient water was being provided by the City.[197] However, as the Supreme Court of Appeal pointed out in its earlier decision, the City had not argued that it had insufficient resources to provide more water to the residents of Phiri.[198] Rather, the City argued that it had no obligation to provide *free* water to these residents.[199]

3.3. Access to Water

At the 'core of [the right to water] is the right of access to water'.[200] This is embodied by the constitutional provision which requires that everyone has the right to have access to sufficient water. Equitable access is one of the primary goals of the Strategy[201] but, as stated above, this does not necessarily entail an equality of goods.[202] However, it does at the very least require that provision must be made for the basic needs of water use to be met.[203] The state has implemented the Free Basic Water Programme with the aim of providing access to water to all.[204] The current daily quota per person amounts to 25 litres per day, or 6 kilolitres per household per day. Commentators argue that this amount is insufficient to meet the basic amount of water required in terms of section 27.[205] The Constitutional Court in the *Mazibuko* decision clearly stated that it was not competent for the court to comment on the sufficiency or not of this amount.[206] This must be compared with the earlier Supreme Court of Appeal's decision

[197] *Mazibuko* (CC) para 61.

[198] *Mazibuko (*SCA) para 27.

[199] *Mazibuko (*SCA) para 27.

[200] M Kidd (note 1 above) 88; H Klug 'Water law reform under the new Constitution' (1997) 1 *Human Rights and Constitutional Law Journal of Southern Africa* 6.

[201] Strategy (2013) ii.

[202] It has been pointed out that the Free Basic Water Policy implemented in South Africa further entrenches inequality. See in this regard, M Muller 'Free basic water – a sustainable instrument for a sustainable future in South Africa' (2008) 20 *Environment and Urbanization* 67 – 87 .See note 143 above.

[203] See above at Ch 3 (note 69).

[204] M Kidd (note 1 above) 90. H Mackay (note 5 above) 70 - 71.

[205] M Kidd (note 1 above) 91.

[206] *Mazibuko* (CC) para 61.

which ordered that the City be required to revise its policy in such a manner that 42 kilolitres were provided to those who could not afford to pay for water,[207] as 25 litres was insufficient.[208]

In South Africa, the inequality of access to resources is exacerbated by poor literacy levels, poverty and infrastructural inadequacies inherited from Apartheid.[209] The stark contrast between running water and flushing toilets in suburban households as compared to the lack of sanitation and clean water in township areas underscores this reality.[210] In addition, dumping sites, industrial zones and other waste manufacturers and facilities are often on the doorstep of the most vulnerable in the community, contributing to a further degradation of environmental health and well-being.[211] In the 1980s, environmental movements emerged, which focused on what are termed 'brown agenda' issues, that is, they focus on the importance of the environment in ensuring healthy and safe living and working conditions, as opposed to conservationist-oriented movements which existed before (termed 'green agenda' issues).[212] Intrinsic to this progression was the understanding of the inextricable link between poverty and the environment.[213] It is clear that poverty is, and will remain, intimately linked to the

[207] *Mazibuko (*SCA) para 43.

[208] *Mazibuko (*SCA) para 16 – 24.

[209] See note 172 above.

[210] D A McDonald 'Up against the (crumbling) wall' in D A McDonald (ed) *Environmental Justice in South Africa* (2002) 293. See also *Democratic Alliance and Another v Masondo NO and Another* 2003 (2) SA 413, where O'Regan states that

> 'the apartheid city, althouth fragmented along racial lines, integrated an urban economic logic that systematically favoured white urban areas at the cost of black urban and periurban areas. The results are tragic and absurd; sprawling black townships with hardly a tree in sight, flanked by a vanguard of informal settlements and guarded by towering floodlights, out of stone throws reach. Even if only short distance away, nestled amid trees and water and birds and tarred roads and paved sidewalks and streetlit suburbs and parks and running water and convenient electrical amenities...we find white suburbia'.

[211] See M Kidd (note 1 above) 299; D A McDonald (note 18 above) 3; L Ferris (note 5 above) 139; B Dodson 'Searching for a common agenda' in D A McDonald (ed) *Environmental Justice in South Africa* (2002) 97; G Ruiters 'Race, place and environmental rights' in D A McDonald (ed) *Environmental Justice in South Africa* (2002) 114 – 117.

[212] D A McDonald (note 18 above) 28 – 29; B Dodson (note 211 above) 96.

[213] D A McDonald (note 18 above) 27 – 31.

quality and quantity of available resources.[214] The Strategy acknowledges this link.[215] However, the Constitutional Court, having had a chance to pronounce on this exact issue, failed to reinforce the problematic nature of the relationship between poverty and access to resources.[216]

In the case of *Mazibuko and Others v City Of Johannesburg and Others*, the Constitutional Court acknowledged the inherently unequal nature of access to water in South Africa.[217] The way in which the cost of water is calculated and charged also presents difficulties. The court in *Mazibuko* grappled with the difficulties inherent in establishing a pricing strategy that was fair and accommodating of the most vulnerable in society.[218] Given the complexity of water management and the difficulties associated in recouping payment from water users, the pre-paid metering system is one of the practical ways in which the sustainable use of water can be implemented and monitored.[219]

The duty to provide access to water also includes a duty on the state to provide water services in terms of the Water Services Act. This requires the state 'to progressively ensure efficient, affordable, economical and sustainable access to water services'.[220] This duty is, however, limited by the available water supply and the duty to conserve water resources, the duty to ensure access to water and regulate water services on an equitable basis, and the requirement that consumers

[214] L Ferris (note 5 above) 139.

[215] Strategy (2013) 12 – 13.

[216] See generally J Dugard 'Rights, Regulations and Resistance: The Phiri Water Campaign' (2008) 24 *South African Journal on Human Rights;* P Bond and J Dugard 'The case of Johannesburg water: What really happened at the pre-paid "Parish pump"' (2008) 12 *Law, Democracy and Development.*

[217] Para 2.

[218] Para 86 - 89. However, see Francis who discusses the injustices caused by the current system of pricing water; R Francis 'Water justice in South Africa: natural resources policy at the intersection of human rights, economics and political power' (2005-2006) 18 *Georgetown International Environmental Law Review* 23 – 30; A Gowlland-Gualtieri 'South Africa's water law and policy framework: Implications for the right to water' (2007) 3 *International Environmental Law Research Centre* 7.

[219] K Winter 'Urban Use of Water' *The Sustainable Water Resource Handbook* 75; A Gowlland-Gualtieri 'South Africa's water law and policy framework: Implications for the right to water' (2007) 3 *International Environmental Law Research Centre* 8.

[220] S 11(1) of the Water Services Act.

pay a reasonable fee for water.[221] In addition, this duty is limited by the geographic features of the area in question, as well as the right of the authorities to discontinue water services, provided a 'failure to comply with reasonable conditions set for the provision of such services' exists.[222]

The Water Services Act requires a number of considerations to be taken into account by water services authorities in fulfilling its duty to provide access to water services.[223] They must take into account the need to ensure equitable access to resources.[224] This must be balanced against the necessity to ensure efficient service, as well as economic factors, such as ensuring that costs remain as low as possible.[225]

Bluemel asserts that the right of access entails that water is 'physically and economically accessible to everyone without discrimination or danger to physical security'.[226] Furthermore, the water that is accessible should be both of sufficient quantity and of an acceptable standard for drinking and sanitation purposes.[227] Access to water and the state's attempt to eradicate poverty are closely linked together.[228] In this respect, the state has introduced a number of schemes to increase access to water.[229] Kidd has stated that 'the government's commitment to providing access to water and sanitation to all people cannot be faulted'.[230]

[221] S 11(2) of the Services Act.

[222] S 11(2) of the Services Act.

[223] S 11(3) of the Services Act.

[224] S 11(3)(e) of the Services Act.

[225] S 13(b) and (d) of the Services Act.

[226] E B Bluemel (note 182 above) 974.

[227] E B Bluemel (note 182 above) 974. He includes 'drinking, personal sanitation, washing of clothes, food preparation, personal and household hygiene' in this list.

[228] M I Msibi and P Z Dlamini (note 131 above) 18.

[229] For example, the National Water Investment Framework will provide financial assistance to 'water-based rural livelihoods'. See Strategy (2013) 89.

[230] M Kidd (note 1 above) 92. See also B Dodson (note 211 above) 96 – 97.

However, sanitation services in many township and rural areas are still inadequate to ensure that the constitutional values of dignity are satisfied.[231]

The Strategy, as well as the National Water Policy Review, has reiterated the importance of ensuring equitable access to water.[232] One of the ways in which the state aims to better ensure equality of access to water is to introduce a 'use-it or lose-it' scheme.[233] Where legitimate users of water fail to use their allocated quantities, the State aims to recall this legal entitlement. The available water will then be placed in the 'public trust', where after it will be reallocated to other users on the basis of furthering racial and gender goals.[234]

3.4. Beneficial Use of Water in the Public Interest

New water uses are only to be authorised if it can be shown that the water use is beneficial and in the public interest.[235] The beneficiaries of water resource management are the public, and consequently, decisions pertaining to water and its use must be made in the public interest.[236] This requires the 'efficient, sustainable and beneficial use' of water.[237] When a responsible authority makes a determination as to whether a general authorisation or license should be awarded for the use of water, for example, they must take into account whether the proposed use is efficient, beneficial and in the public interest.[238] In this respect,

[231] See, for example, the account by M Ndandu (note 179 above) 127 - 130.

[232] P Saxby 'New Water Bill to ensure equitable access' (2013) *LegalBrief Policy Watch.*

[233] P Saxby 'Department plans pro-poor amendments to water law' (2013) *LegalBrief Policy Watch*; LegalBrief 'New Legislation will ensure greater equity in water resource allocation' (2013) *LegalBrief Policy Watch.*

[234] See Ch 3 (note 427 above).

[235] R Francis (note 218 above) 18. See also Ch 4 (note 270 above). See also E van der Schyff (note 60 above) 54, who discusses the requirements of the public interest. For a discussion on the public interest generally see R Barnes *Property Rights and Natural Resources* (2009) 68.

[236] S 2(d) of the Act.

[237] S 2(d). E van der Schyff (note 60 above) 55.

[238] S 27(c). See also E van der Schyff (note 1 above) 384.

the authority must also consider the socio-economic impact of both the water use itself and the refusal thereof.[239]

The Strategy states that the factors that may be considered in deciding whether a water use is beneficial and in the public interest include the following: the possibility of job creation; the extent to which the use would affect the environment; the extent to which the use would affect other users; the extent to which the use would further economic and social development; and whether the proposed use of water would further the goals of equitable access to water.[240]

4. Efficiency

Modern water infrastructure must take into account the immediate needs of providing basic access to water, as well as ensuring that the costs, both financially and to the environment, are not too high.[241] These principles were discussed above in the context of sustainability and equity. The furthering of these goals requires solutions to water management that promote efficiency. An efficient administration is constitutionally mandated by section 33(3) of the Constitution.[242] Alternative methods of water management, provision of water services and development of infrastructure, with a focus on efficiency, need to be highlighted as the next step in the development of infrastructure generally.[243]

The Strategy has reaffirmed the importance of the state's role in ensuring the efficient and effective functioning of water management.[244] The efficiency of

[239] S 27(d).

[240] M I Msibi and P Z Dlamini (note 131 above) 18.

[241] P H Gleick 'A look at Twenty-first century water resource development' (2000) 25 *Water International* 130.

[242] In particular, s 33(3)(c) states that 'National legislation must be enacted to give effect to these rights, and must – (c) promote an efficient administration'. See also E Bray (note 25 above) 158.

[243] See for example A Doyle 'World set to use much more wastewater – U.N.-backed study' *World Environmental News* 5 September 2013; T Sato, M Qadir, S Yamamoto *et al* 'Global, regional, and country level need for data on wastewater generation, treatment, and use' (2013) 130 *Agricultural Water Management* 1–13.

[244] Strategy (2013) 61.

water management in particular will depend on the proper functioning of the administration itself, which requires not only that administrators have the requisite skills and education to perform their tasks, but also that the administration is transparent and accountable. Secondly, for the administration of water management to be efficient, the requisite physical infrastructure facilitating this must be in place. Infrastructure in the context of this discussion refers not only to the physical entities necessary for the provision of water services, but also the institutional infrastructure necessary to properly implement the goals of trusteeship.

The importance of a competent administration together with the requisite skills and technology will be discussed below. In addition, the duty of the state to ensure that the physical infrastructure of water management is functional will also be discussed. The requirement that administrators act in accordance with the principles of democracy (such as transparency and accountability) will be discussed in Chapter 7.

4.1. Functioning Infrastructure

The importance of the proper functioning and operations of water infrastructure to the provision of water services has been acknowledged by the state.[245] The Act establishes as one of its purposes the promotion of dam safety and the management of floods and droughts, which requires that the necessary infrastructure should be in place to manage these conditions.[246] However, the day-to-day provision of water and water services would not be possible if the necessary infrastructure was not in place, which would result in a breach of the duties of statutory trusteeship. Consequently, the Act allows the Minister to acquire, construct, alter, repair, operate and control waterworks.[247] However, there are countless media reports of municipalities around the country which are failing to fulfill their trusteeship duties, by not ensuring that the infrastructure in place is

[245] SAPA 'Water shortage in SA possible – Molewa' *News 24* 20 May 2013.

[246] S 2(j) and (k). See also s 117 – 123 and National Water Act GNR139 of 24 February 2012: Regulations on safety of dams.

[247] S 109.

adequate, functioning properly or appropriately staffed with skilled operators.[248] The shortcomings of these municipalities result in a failure to ensure the safe and sufficient supply and storage of water as well as the rehabilitation of polluted water – presenting one of the biggest hurdles to overcome in the arena of water management.

4.1.1. Efficient Water Demand and Supply Systems

One of the purposes of the Act is to ensure that the demands for water use are met[249] and at present there is sufficient available water from traditional sources in South Africa to meet these demands.[250] However, this may not always be the case, particularly given the high volumes of water that are lost as a result of poorly maintained infrastructure. Recently, the Water Research Commission published a report highlighting the wastage of water around the country with up to 90% of water being lost through leaking pipes and theft in some municipal regions.[251] This water is termed 'non-revenue water'.[252] A total of 40% of South Africa's water, worth R7 billion, is lost or stolen annually.[253] The wastage has been attributed to poor management and a failure to adequately maintain records of water usage.[254]

While there may be sufficient water overall to provide for the needs of water users, there are a concerning number of water regions that experience damaging

[248] SAPA 'Water crises in N West, Mpumalanga towns' *News24* 1 March 2013. See also M Madlala 'Skills shortfall has impact on water' *IOL* 9 July 2013.

[249] S 2(f).

[250] Strategy (2013) 40.

[251] This figure was refuted by the municipal spokesperson, Brian Zuma, who stated that the Auditor-General's report showed an improvement in decreasing the volume of wasted water. News24 'Msunduzi slammed over water waste' *News24* 11 February 2013. The Strategy (2013) itself states that up to 90% of non-revenue water is being lost in certain municipal regions.

[252] Strategy (2013) 8.

[253] Strategy (2013) 54; S Blaine 'Nearly 40% of municipal water lost en route to customers' *Business Day* 20 March 2013; News24 'Msunduzi slammed over water waste' *News24* 11 February 2013; C Wijnberg 'The inefficiency scourge' *Financial 24* 13 May 2013; S Kings 'Water crisis looms, but there's hope in the pipeline' *Mail and Guardian* 22 March 2012; S Kings 'Edna puts a damper on water pirates' plans' *Mail and Guardian* 6 March 2012;S Kings 'Leakage a drain on resources' *Mail and Guardian* 9 December 2011.

[254] News24 'Msunduzi slammed over water waste' *News24* 11 February 2013.

water shortages. In a survey completed in 2004, almost half of the water regions in South Africa did not have sufficient water to meet their water use demands.[255] In many of these areas, it would be impractical and very costly to transfer water from basins where there is a surplus.[256]

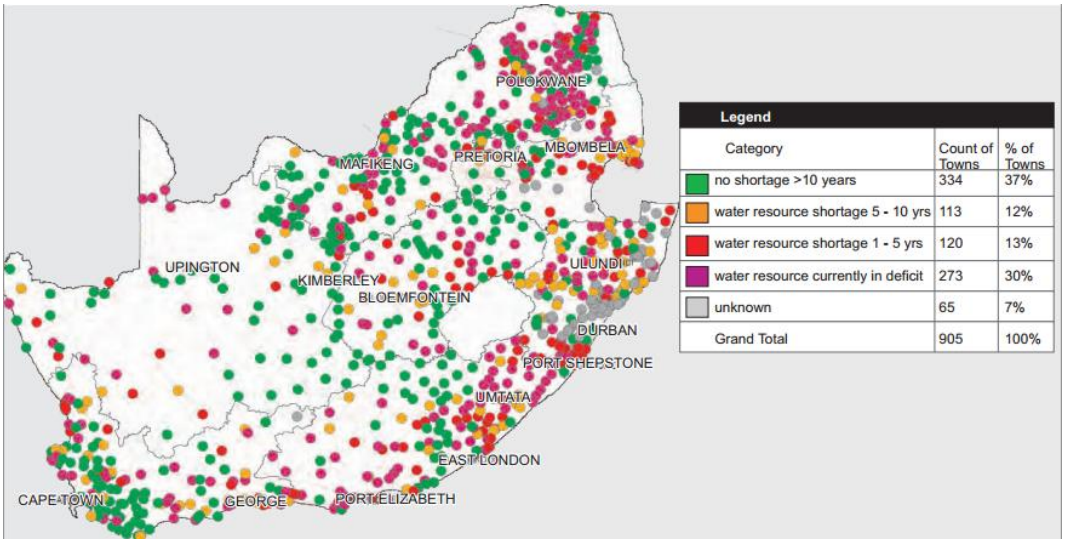

Figure 4: Water deficit regions in South Africa[257]

The National Water Conservation and Water Demand Management Strategy aims to minimise water loss and reduce the overall demand for water.[258] One of the goals of this Strategy is to reduce the amount of water lost and stolen at a municipal level.[259] Two of the proposed solutions are to install a more accurate metering system and also to ensure that water is appropriately priced and the funds collected.[260] The Department may create regulations to govern this aspect and such regulations are required to account for the needs of the vulnerable by ensuring that the pricing of water is appropriate.[261]

[255] Strategy (2013) 18. The National water balance tables which set out the estimated water availability in each region were not calculated for the 2013 Strategy.

[256] Strategy (2013) 40.

[257] Strategy (2013) 23.

[258] Strategy (2013) 52.

[259] Strategy (2013) 53.

[260] Strategy (2013) 53.

[261] Strategy (2013) 70.

In addition to this Strategy, the Department has introduced a number of mechanisms to ensure that the demand for water does not outweigh the supply thereof, which at the present rate of water usage would occur in 2030.[262] In balancing the supply and demand, fixed targets to improve the efficiency of water use were established through strategies called Reconciliation Strategies.[263] The development and maintenance of infrastructure is one of the focus areas of these strategies.[264] The measures include the development of the Lesotho Highlands Water Scheme, which is to become operational in 2020, as well as the introduction of desalination plants around the country.[265] The Department has also dedicated R4.3 billion to municipalities, which are experiencing a water crisis, the number of which amounts to 30% of the municipalities in the country.[266] The recycling of waste water, as well as the treatment of acid mine drainage, are further initiatives which are to be implemented over the next few years.[267] At present, this waste is not adequately addressed.[268] Finally, the Department aims to educate the public about the importance of water in an effort to reduce the total demand required.[269]

In 2004, the first National Water Resource Strategy provided that before any new infrastructure is built, water use must be reduced and minimised by reducing

[262] Strategy (2013) Ch 7; S Kings 'Molewa: SA won't run out of water' *Mail and Guardian* 3 July 2013; D Alfreds 'SA water infrastructure is key – expert' *News24* 21 May 2013; SAPA 'Water shortage in SA possible – Molewa' *News24* 20 May 2013.

[263] Strategy (2013) 57.

[264] Strategy (2013) 26.

[265] But see P H Gleick (note 241 above) 135 who argues that the high economic cost of implementing desalination plants makes it an unattractive water supply. S Kings 'Molewa: SA won't run out of water' *Mail & Guardian* 3 July 2013; B Phakathi 'Cape Town eyes seawater option' *Business Day* 15 July 2013.

[266] Strategy (2013) 5. J Yeld 'SA's water Strategy approved' *IOL* 4 July 2013; S Kings 'Molewa: SA won't run out of water' *Mail & Guardian* 3 July 2013; Editorial 'Little enough to drink and even that's being fouled' *Times Live* 12 August 2013.

[267] P Saxby 'Department plans pro-poor amendments to water law' *Legalbrief* 5 July 2013; S Kings 'Molewa: SA won't run out of water' *Mail & Guardian* 3 July 2013. This is consistent with modern suggestions on how to manage water supply and demand more carefully. See P H Gleick (note 241 above) 135.

[268] Strategy (2013) 25.

[269] Strategy (2013) 42. S Kings 'Molewa: SA won't run out of water' *Mail & Guardian* 3 July 2013.

water loss and implementing more efficient systems. [270] Plus Economics has said that the water infrastructure in place in South Africa is sufficient to meet its needs, but is not adequately maintained, rehabilitated and managed.[271] Consequently, huge water losses can be avoided if the current water infrastructure is properly preserved and maintained. A focus on increasing the efficiency of existing systems is to be preferred to building new ones. The focus of these improvements should aim to prevent water loss as well as conserve water. In particular, the efficiency of these systems must be improved, in terms of reducing the demand for water rather than by increasing the supply thereof.[272] There is thus a renewed focus on introducing mechanisms that use water efficiently. An example of such an efficiency measure is found in Mexico city, where toilet flushing systems were re-designed with the result that enough water was conserved to satisfy the daily water needs of 250 000 people.[273] The goal, therefore, is to identify areas in South Africa where water can be used more efficiently.

The Strategy has identified certain key areas where changes to water use patterns and infrastructure can reduce water use. It is estimated that, worldwide, only 40% of water used for agricultural purposes translates into food production.[274] In South Africa, over 60% of water consumed is used for agricultural purposes and decreasing the quantity of water required by implementing more efficient systems can result in huge water savings. Efficient solutions that have worked in other countries include implementing a drip-method irrigation system, or more precise sprinkler systems, that have dramatically improved the efficiency of irrigation.[275] By implementing more efficient systems, the demand for water can be reduced, rather than having to increase the supply for the same services. The Strategy has

[270] Strategy (2013) 57. See also H Mackay (note 5 above) 49 - 50.

[271] N Odendaal 'SA's economy' *Engineering News* 22 May 2013. See also Strategy (2013) 29, indicates that there is a large infrastructure of dams throughout the country. However, many of these have not been properly maintained.

[272] P H Gleick (note 241 above) 132; G R Backeberg 'Water institutional reforms in South Africa' (2005) 7 *Water Policy* 119.

[273] P H Gleick (note 241 above) 132.

[274] P H Gleick (note 241 above) 133.

[275] P H Gleick (note 241 above) 133; H Mackay (note 5 above) 77; C Sullivan 'Calculating a water poverty index' (2002) *World Development* 1197.

recognised the importance of these methods, particularly in the context of reducing water demand in the agricultural sector.[276] More efficient systems are to be introduced in this sector to prevent water loss and increase the efficiency of water use.[277]

One of the measures being implemented by the Msunduzi Municipality is the installation of water pressure management systems that can learn the 'operating characteristics of the water distribution network and optimise water supply'.[278] This will not only manage the water supply more proficiently, but also provide decision-makers with key information about water use. Improved technology is central to assisting with water management, addressing the goals of water reform and increasing the efficiency of water use systems.[279]

The national and catchment management strategies are required to set out objectives for the establishment of institutions to meet water management goals.[280] It is argued that sustainable development cannot be achieved if the correct infrastructure is not in place, and, more importantly, if this infrastructure, once in place, is not being used properly. Consequently, the state as trustee is required to ensure that the requisite infrastructure is in place to provide water services, and further, that this infrastructure promotes the efficient use of water.

4.1.2. Institutional Inefficiency

The institutional framework of water management has given rise to difficulties over the past few years, as the roles and functions of the different institutions have not been clearly defined, resulting in an overly complex system.[281] In addition, there have been insufficient institutions to deal with water management

[276] Strategy (2013) 55.

[277] Strategy (2013) 55. For example, it has been suggested that water used for cooking, washing and laundry could be used as recycled water for the purpose of flushing toilets – see M Muller (note 202 above) 83.

[278] News24 'Msunduzi slammed over water waste' *News24* 11 February 2013.

[279] B Schreiner, G Pegram and C von der Heyden (note 36 above) 9.

[280] S 6(j) and 9(i).

[281] Strategy (2013) 59.

properly.[282] The delineation of water management is also proving to be a hindrance in certain circumstances, particularly in the context of the municipal management of water. The planning and coordination of water management at a national level appears to be running quite smoothly. However, at a municipal level the implementation of these policies and strategies is inadequate. For example, the Strategy highlights that many municipalities are not dedicating sufficient funding to the development of water resource infrastructure.[283]

The state has acknowledged these difficulties and created the Institutional Reform and Realignment process to remedy this situation.[284] The state aims to target the management of institutions at the national, regional, catchment and local level with a goal to simplifying the institutional approach to water management.[285] It also aims to streamline and more clearly delineate institutional powers.[286]

To improve institutional efficiency, the allocation of powers and responsibilities is to be revisited to ensure that there is no duplication in functions and the various plans and strategies are in harmony with one another.[287] This is not only between different state departments, but also between national, provincial and local levels.[288] To make the allocation of responsibilities clearer, the state will realign the sector so that water users (such as water service authorities and providers in terms of the Water Services Act) are not involved in the process of water use allocations.[289] As a result, the state aims to clearly separate institutions responsible for the regulation and operation of water management.[290] Further to this process of enhancing efficiency, the Minister will delegate his or her powers relating to the implementation of the plans and policies as well as the

[282] Strategy (2013) 59.

[283] Strategy (2013) 25.

[284] Strategy (2013) 59.

[285] Strategy (2013) 59.

[286] Strategy (2013) 59.

[287] Strategy (2013) 61.

[288] Strategy (2013) 61.

[289] Strategy (2013) 61.

[290] Strategy (2013) 61.

'development, financing, operation and maintenance of water resources infrastructure'.[291] The goal is for the national level to focus only on 'policy development, strategic planning, regulatory oversight and support'.[292]

Water management at a municipal level is problematic and, in this respect, the Strategy promotes the adoption of a differentiated approach. This allows the state to facilitate a different level of support to municipalities depending on their needs. The state will also offer institutional support to municipalities through the forum of Regional Water Utilities. The Regional Water Utilities will be able to contract out their services to municipalities for the provision of water services, or provide these services directly to water users on behalf of the municipality in question.[293] More generally, tighter fiscal controls are to be implemented requiring municipalities to more successfully recover costs from water users.[294]

4.1.3. Financial Inefficiency

The Department of Water Affairs estimates that it requires R700 billion over the next ten years for investment in water and sanitation infrastructure - approximately R70 billion per year.[295] To put this staggering amount into perspective, for the 2013/ 2014 financial year, the Department of Water Affairs was only allocated R10.2 billion, evidencing that it is desperately underfunded.[296] The Department has called on the private sector to invest in the development of infrastructure to provide some of the financial shortfall that is necessary.[297] The revision of the current pricing Strategy will also aim to address this deficit by

[291] Strategy (2013) 62.

[292] Strategy (2013) 62.

[293] Strategy (2013) 64.

[294] Strategy (2013) 86.

[295] Strategy (2013) 84. *SAPA* 'SA needs R670bn for water, sanitation' *News24* 21 May 2013; L Donnelly 'South Africa's Water crisis just got expensive' *Mail and Guardian* 16 April 2012.

[296] Strategy (2013) 85.

[297] Strategy (2013) 85. SAPA 'Water shortage in SA possible – Molewa' *News24* 20 May 2013.

ensuring that the full costs of water infrastructure and management are taken into account.[298]

The financial governance of the water management sector has been brought to light in the Strategy, citing theft, water leakages and failure to ensure payment of accounts as some of the reasons for the poor financial performance of municipalities. Other reasons that are given are the high costs of treating polluted water, poor monitoring of water use, inefficient pricing mechanisms, and unsuitable revenue and debt management. While some of the financial losses are therefore attributable to inefficiency, 'corruption, tender fraud, maladministration and lack of governance' are also some of the reasons for the high financial losses experienced at a municipal level.[299] These problems in the financial management of water will further add to the woes of managing the enormous R700bn budget required to ensure that South Africa's infrastructure is furthered.

In a study undertaken by the Water Research Commission, together with the South African Local Government Association, a number of municipalities' performances in terms of infrastructure were evaluated. It was found that many of the municipalities were reactive rather than proactive, and lacked the skills and facilities to properly manage water supplies. Municipalities also failed to dedicate sufficient funding, or simply did not have the funds to allocate to water management and infrastructure.[300] To improve the financial health of municipalities and the water sector generally, more emphasis will have to be placed on recouping the expenses of water use from consumers. This also entails the strengthening of financial skills and capacity at a municipal level, skills which are in short supply.[301]

Technical incapacity and a lack of infrastructure are some of the biggest challenges that face the proper implementation of the Water Conservation and

[298] P Saxby 'Department plans pro-poor amendments to water law' (2013) *LegalBrief Policy Watch.*

[299] Strategy (2013) 86.

[300] Madlala, M 'Skills shortfall has impact on water' *IOL* 9 July 2013

[301] Strategy (2013) 86.

Water Demand Management programme, as envisaged by the Strategy. To this end, the Department aims to provide guidance on the implementation of these programmes, build on the success of other municipalities in this regard, and look to the private sector to provide the technical and financial expertise necessary.[302] The Strategy also aims to improve the management of water conservation and demand before it uses funding to build new infrastructure. The intention is that the Water Conservation and Water Demand Management programme is central to reducing financial losses by reducing water losses and increasing the quantity of water available.[303]

4.1.4. Lack of Skills in the Industry

The Strategy has acknowledged that the overly complex institutional system, as well as the shortage of technical skills in the industry, presents a huge obstacle to ensuring that water is managed efficiently.[304] According to the Strategy, over 57% of the engineering positions in the Department are vacant. In addition, over 23 000 management staff are immediately required, as well as an additional 12 000 people for the purposes of fulfilling developmental and financial management roles.[305] The Strategy has identified the development of its institutional capacity as a key area for development including the improvement of human resources, managing and monitoring systems.[306] Further regulations are still required to govern the qualifications required for the various positions within the sector.[307] By streamlining these institutions and staffing them appropriately, a more efficient system of water management can be created.

Schreiner et al argue, however, that the state is failing to meet its duties to effectively and sustainably manage South Africa's water resources because it does

[302] Strategy (2013) 58.

[303] Strategy (2013) 88.

[304] See also T Humby and M Grandbois 'Human right to water in South Africa and the *Mazibuko* decisions' (2010) 51 *Les Cahiers de Droit* 527 – 528.

[305] Strategy (2013) 96.

[306] Strategy (2013) 63. M I Msibi and P Z Dlamini (note 131 above) 59.

[307] Strategy (2013) 72.

not have the capacity to do so. They argue that the state has consistently adopted the approach of implementing complicated water policies, with the expectation that the requisite capacity will then be developed. However, they point out that this has failed. They further argue that the correct approach would be to adopt less sophisticated techniques of water management that operate within the bounds of capacity that already exist.[308] Consequently, while the Strategy aims to simplify the processes involved in the management of water, it is argued that this system is still too complex to function until the skills shortage in the sector is remedied.

4.2. Cooperative Governance

Both the National Water Act and the Water Services Act require the promotion of the principles of cooperative governance.[309] In addition, the National Environmental Management Act requires that government departments must cooperate with each other, and this is consistent with the requirements set out by Chapter 3 of the Constitution.[310] The purpose of this cooperation is to ensure that there is consistency and harmonisation of policies, legislation and procedures that are implemented in accordance with the legislative framework.[311] Where any conflicts exist between departments, the appropriate conflict resolution mechanisms must be utilised.[312] This harmonisation will further the goals of institutional efficiency.

[308] B Schreiner, G Pegram and C von der Heyden (note 36 above) 9 - 10.

[309] The Preamble to the Water Services Act states that 'in striving to provide water supply services and sanitation services, all spheres of Government must observe and adhere to the principles of cooperative government'. See also s 63(9) of the Water Services Act as well as s 22(4) and Ch 8 of the National Water Act. For a general discussion on cooperative governance within the context of environmental management, see L J Kotzé (note 20 above) 120 discussing United Nations *Good Governance: Enhancing Macro-Mangement in the ESCWA Region* (2001) 121 – 124.

[310] M Kidd (note 1 above) 35. For a further discussion on the topic, see F Craigie, P Snijman and M Fourie (note 28 above) 68 – 69; R Pejan, D du Toit and H Thompson 'Norms for policy implementation lags in the South African water sector' (2011) *Report to the Water Research Commission* 3.

[311] S 2(4)(l).

[312] S 2(4)(m).

The Act requires the Strategy to determine and promote the interrelationship between agencies in a holistic and integrated manner.[313] In addition, a catchment management agency must, in the process of establishing its Strategy, consult with the Minister and any organ of state or interested party who may be affected, thereby promoting the goals of cooperative governance.[314] The Strategy reinforces the importance of cooperative governance to manage water properly. Particularly in the context of bringing awareness of the importance and value of water to various stakeholders, including business and communities, the Strategy reiterates that the Department requires the cooperation of other departments.[315]

While this legislatively enacted goal seeks to harmonise the state's approach to water management, the practical implementation of cooperative governance is poor. This is particularly so between the Department of Water Affairs and the Department of Mineral Resources, which are arguably the two departments that need to communicate the most in the context of the protection of water resources.[316]

An area of great concern in the context of water management is the protection of the resource where mining activities are involved. The pollution of water resources caused by years of mining activities is experienced around the country.[317] While regulations are in place that require, *inter alia*, the careful protection of water and the prevention of pollution, either through run-off, seepage or leeching, these mechanisms are not properly enforced.[318] Contravention of these regulations is an offence and could result in a fine or

[313] S 6(1)(k) and (l).

[314] S 10(2).

[315] Strategy (2013) 42.

[316] W du Plessis and A A du Plessis (note 5 above) 419; S Blaine 'Ministers squabble amid mining law maze' *Business Day* 5 June 2013; R Pejan, D du Toit and H Thompson 'Norms for policy implementation lags in the South African water sector' (2011) *Report to the Water Research Commission 24.*

[317] B H Usher and P D Vermeulen 'The impacts of coal and gold mining on the associated water resources in South Africa' in Y Xu and B Usher (eds) *Groundwater Pollution in Africa* (2006) 301 ff.

[318] National Water Act GNR 704 of 4 June 1999: Regulations on use of water for mining and related activities aimed at the protection of water resources.

imprisonment of up to five years.[319] This not only applies to the manager or employee of the mine who contravened the regulations, but also the person in control of the mine, where express or implied consent can be shown.[320]

The Strategy, in giving effect to the principles of cooperative governance, has stated the processes of the Department of Water Affairs and the Department of Environmental Affairs are to be consolidated in a number of instances. First, the coordination of programmes in the two departments relating to compliance and monitoring of water use authorisation and other water uses will be promoted.[321] Secondly, in the context of climate change the two departments will be required to align their approaches to managing the anticipated environmental changes.[322] The application for a mining license is also to be consolidated. To obtain a mining license, it is going to become a requirement that a water license is also obtained. However, to ensure that this process is swift, there are plans to consolidate the mining and water license application into one.[323]

Greater efficiency has economic benefits, for example, not dissuading foreign investment by making the process lengthy, costly and complicated. However, it is unclear who will have the power to award and monitor these licenses. Should the process of awarding and monitoring licenses be given to the Department of Mineral Resources, as it is anticipated that it will be, this will decrease the scope and power of the Department of Water Affairs.

The courts have recognised the importance of cooperative governance.[324] In 2012, the North Gauteng High Court exempted the Minister and Department of Water Affairs from a ruling that it made against the Carolina Municipality, for failure to fulfill its duties. The water source for this region had been polluted by mining activities, resulting in acid mine drainage. Despite the National Government's

[319] Reg 14(1).

[320] Reg 14(2).

[321] Strategy (2013) 74.

[322] Strategy (2013) 75.

[323] C Mathews 'Mining indaba – Minister promises faster time' *Financial Mail* 6 February 2013.

[324] See *Grootboom* para 82. H Thompson (note 39 above) 134.

attempts to provide drinking water to the residents of Carolina, the municipality had hampered these efforts. The Minister was also critical of local government's failure to address infrastructural concerns timeously. She specifically acknowledged the Department's role as custodian of water, indirectly stating that this applied to all water services authorities as defined by the Water Services Act.[325]

There is some debate as to whether Catchment Management Agencies' are subject to the principles of cooperative governance.[326] Consistent with the arguments put forward by Pejan and Cogger, it could not have been the intention of the Act for agencies to be excluded from the purview of the principle of cooperative governance, given the central role they are intended to perform in the context of water management. Thus, despite the fact that the Act does not make this clear, the purpose of the Act and water management generally would favour an interpretation that ensures that these agencies are treated consistently with other institutions.[327]

4.3. Cooperation with the Private Sector

Cooperation between the state, civil society and the private sector is crucial to achieving the goals of sustainable development.[328] The state has acknowledged the importance of the private sector to water management efforts and the need for

[325] *Federation for Sustainable Environment and Another v Minister of Water Affairs and Others* (35672/12) [2012] ZAGPPHC 140 (26 July 2012). Preamble read together with s 11(1) of the Water Services Act. Editorial 'Water in Carolina, at last' *Mail and Guardian* 13 July 2012; S Kings 'Court orders municipality to provide water in Carolina' *Mail and Guardian* 10 July 2012; S Kings 'Carolina's water woes indicate larger structural problems' *Mail and Guardian* 19 July 2012.

[326] See in this respect L J Kotzé (note 20 above) 120 and R Pejan and J Cogger 'The application of assignment and delegation within the context of the National Water Act: the implications for Catchment Management Agencies' (2013) 130 *SALJ* 130 – 132.

[327] R Pejan and J Cogger (note 326 above) 132.

[328] L J Kotzé (note 20 above) 120 discussing United Nations *Good Governance: Enhancing Macro-Mangement in the ESCWA Region* (2001) 7. Included in this is the cooperation of communities at a grassroots level, particularly in rural areas. See in this regard Water Research Commission 'Upscaling community-based partnerships in South Africa' (2014); K Lehmann 'Voluntary compliance measures' in A Paterson and L Kotzé (eds) *Environmental Compliance and Enforcement in South Africa* (2009) 284; M Faure and W du Plessis (note 5 above) 156; B J Richardson and S Wood *Environmental Law for Sustainability* (2006) 169.

cooperation between the private and public sector.[329] One of the stated principles of the Strategy in the context of the reduction in water demand is to focus on collaborations between the public and private sector[330] and the services that they can offer in terms of financial assistance and technical skills. Businesses can offer skills and infrastructural development to society, particularly in more remote areas. The complementing of the skills and capacities of these entities is referred to as 'complementary core competencies'.[331] At the same time, the establishment of companies in these areas has to be monitored by both government and Non-Governmental Organisations ('NGO's') to ensure that the communities' interests are properly considered.[332]

The nature of the relationship between government and NGOs should be symbiotic rather than antagonistic - government is able to derive an advantage from NGOs by utilising the wealth of skills, findings and perspectives they have to offer, while NGOs can derive a benefit from governmental cooperation.[333] However, this relationship must be treated with caution so as to avoid the situation where government will 'strike deals with self-interested pressure groups' under the guise of public participation.[334]

The long-term consequences of the industry failing to realise the severity of a water shortage cannot be understated: a water shortage will be felt in every sector,

[329] M Kidd (note 1 above) 11. See also N Odendaal 'SA's economy' *Engineering News* 22 May 2013.

[330] Strategy (2013) 56, 63.

[331] R Hamann and N Acutt 'How should civil society (and the government) respond to 'corporate social responsibility'? A critique of business motivations and the potential for partnerships' *Development Southern Africa* (2003) 261.

[332] R Hamann and N Acutt (note 331 above) 261; J J du Plessis, A Hargovan and M Bagaric (eds) *Principles of Contemporary Corporate Governance* (2011) 24. However, note that NGOs in South Africa also pose potential problems in that the organized, well-funded and resource-rich NGOs are predominantly white, while predominantly black NGOs are under-resourced and under-funded. This may skew the nature of the interests represented by NGOs. See in this respect D A McDonald (note 18 above) 37.

[333] See, however, I Smillie and H Helmich *Stakeholders: Government-NGO Partnerships for International Development* (1999) 10 who details that the relationship is never one between 'equals' and the 'weaker partner is obliged to accept the practices and policies of the funding agency'.

[334] C Hoexter *Administrative Law in South Africa* 2ed (2012) 81; M Faure and Willemien du Plessis *The Balancing of Interests in Environmental Law in Africa* (2011) 156.

and preliminary estimates suggest that it will result in a 1.2% decline in South Africa's annual GDP (gross domestic product).[335] While this may not sound like much, this would have amounted to a loss of 4.61172 billion US $ in 2012.[336] However, there have been developments in the private sector that indicate knowledge of these consequences,[337] and programmes have been implemented that evidence cooperation between the private and public sector.

The most notable of these is a programme developed by Sanlam, titled the Living Waters Programme, which together with its initial R12 million investment has attracted a further R67 million from other industry players. The programme's applicability has been extended from only fresh water to 'anything to do with water, anywhere in the country and off its shores'. This proactive approach has been welcomed by the WWF fund and it is hoped that other key industry players will adopt a similar approach.[338]

Whilst this thesis focuses on the obligations of the state as trustee to ensure sustainable development, one of the most important stakeholders in this process is the private sector. The constitutional provisions relating to the protection of the environment and the requirements to provide access to water[339] will be applicable to private actors to the extent that the Constitution is also horizontally applicable.[340] Where this is the case, private actors may be held to the same standard as the state in terms of ensuring the rights in the Bill of Rights are satisfied.[341]

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[335] N Odendaal 'SA's economy' *Engineering News* 22 May 2013; S Kings 'Leading the way with water' *Mail and Guardian* 28 June 2012.

[336] The latest available data at the time of publication was taken from the statistics pertaining to the year of 2012, where the annual GDP was 384.31 billion US $. See www.tradingeconomics.com.

[337] B Schreiner, G Pegram and C von der Heyden (note 36 above) 7.

[338] S Kings 'Future water availability is one of the biggest threats facing people and business in South Africa' *Mail and Guardian* 28 June 2012.

[339] See Ch 3 (note 31 above).

[340] See M Kidd (note 1 above) 24; G E Devenish (note 43 above) 19 – 20; S Liebenberg (note 12 above) 319.

[341] I Currie and J de Waal (note 19 above) 50 ff .

Transnational corporations as well as mega-corporations dominate industries around the world. In South Africa, this is particularly so in the mining sector where vast sums of capital are required in order to mine natural resources. The state has had to relinquish much of its control over the private sector and in this respect corporate social responsibility ('CSR') may be a mechanism through which the state can reclaim some of that power.[342] CSR requires companies to be accountable not only to their shareholders, but also other stakeholders that are affected by their business activities, for example, the local community. This extends to a duty to avoid committing harmful acts, that could for example damage the environment, but also to 'engage in activities that promote desirable social ends'.[343] From an environmental perspective, the King Report (2009) stated the following:[344]

> *Sustainability* is the primary moral and economic imperative for the 21st century. It is one of the most important sources of both opportunities and risks for businesses. Nature, society, and business are interconnected in complex ways that need to be understood by decision-makers. Most importantly, current, incremental changes towards sustainability are not sufficient – we need a fundamental shift in the way companies and directors act and organise themselves.

The implementation of CSR is an entirely voluntary imperative of the company as there are no legal requirements for its implementation.[345] The attraction for businesses and companies to implement corporate social responsibility is the improvement in profits as a result of an improved reputation.[346] As a result, many corporations are implementing CSR in order to achieve a 'more responsible,

[342] R Hamannand N Acutt (note 331 above) 256; K Lehmann (note 328 above) 271.

[343] J J du Plessis, A Hargovan and M Bagaric (note 332 above) 432; R Hamann and P Kapelus 'Corporate social responsibility in mining in Southern Africa: Fair accountability or just greenwash' (2004) 47 *Society for International Development* 85.

[344] J J du Plessis, A Hargovan and M Bagaric (note 332 above) 12. See also *King Report on Governance for South Africa* (2009) Johannesburg, Institute of Directors.

[345] J J du Plessis, A Hargovan and M Bagaric (note 332 above) 442- 445.

[346] R Hamann and N Acutt (note 331 above) 256; J J du Plessis, A Hargovan and M Bagaric (note 332 above) 442.

strategic approach to environmental management, labour relations and community development'. [347]

However, criticisms have been leveled against CSR, despite its appeal. The first objection made is that the focus of businesses and corporations should be economic in nature. If businesses tackle social responsibility in addition to their own economic viability they distort market statistics. In addition, they may be enabling the state to shirk its responsibilities by performing its tasks on its behalf. The second concern with CSR is that commercial entities use it as a smoke screen to divert attention away from the negative impacts of manufacturing and production. They implement low-impact, highly publicised changes in order to appear to be accommodating 'changed social expectations and global circumstances'. Whilst businesses may hold the financial key to ensuring the implementation of successful sustainable development, they are also one of the biggest reasons why sustainable development is required in the first place. This is what is known as the 'corporate citizenship paradox'. If the commercial world is not genuinely interested in improving its social and environmental objectives, they are likely to implement just enough change to convey the appearance of genuine concern.[348]

Another criticism that this approach faces is that the involvement of private stakeholders may have the effect of reinforcing the inequality of access to water. Privatisation will tend towards wealthier areas, as the objective of private companies is profit-driven. Consequently, if private companies are too heavily relied on for the provision of water services, this may have the effect of excluding the most vulnerable in society from these services. [349]

[347] R Hamann and N Acutt (note 331 above) 256.

[348] R Hamann and N Acutt (note 331 above) 256 - 258. See also K Lehmann (note 328 above) 273 – 274; R Hamann and P Kapelus 'Corporate social responsibility in mining in Southern Africa: Fair accountability or just greenwash' (2004) 47 *Society for International Development* 86.

[349] See R Francis (note 218 above) 30 - 32. See, in the context of the privatization of water more generally, K J Bakker 'A political ecology of water privatization' (2003) 70 *Studies in Political Economy*.

The way in which to respond to this potential façade is to ensure that an objective standard is developed against which the compliance with environmental and social standards is measured. This should include 'tangible standards and targets, combined with joint industry, civil society and government monitoring arrangements'. Another recommendation made is that civil society utilises compliance with these standards to affect business reputation. This is described as the 'naming and shaming' or 'naming and praising' process.[350]

The state has called on the private sector to invest in the improvements being made to water infrastructure, as the state is unable to finance these improvements unassisted.[351] The Strategy aims to attract investment from the private sector to assist with the funding deficit and one of the stated goals is to encourage the mining sector to invest a portion of the mandatory corporate social investment contribution into the development of the water sector.[352]

5. Concluding Remarks

The purpose of this chapter was to identify and discuss the substantive features of trusteeship that are created by the legal framework. The state, in its role as the trustee when managing water resources, is required to promote the goals of sustainability, equity and efficiency, whilst ensuring compliance with the constitutional mandate as discussed in Chapter 3. This chapter also attempted to highlight the problems that face the state in terms of the implementation of these duties.

Sustainability requires that the considerations of environmental protection are balanced against the needs to promote economic and social development.[353] Three principles assist in ensuring that resources are managed sustainably: the

[350] R Hamann and N Acutt (note 331 above) 259 – 260; R Hamann and P Kapelus (note 348 above) 90 - 91.

[351] SAPA 'Water shortage in SA possible – Molewa' *News24* 20 May 2013.

[352] Strategy (2013) 86.

[353] Note 5 above.

precautionary principle advocates a cautious approach to decision-making;[354] while the preventative principle aims to prevent, minimise and remedy negative impacts to the environment;[355] and the polluter-pays principle holds the polluter responsible for environmental damage.[356] These principles, however, do not necessarily assist with the practical achievement of sustainability.[357]

The second feature that guides water management is the requirement of equity. In this respect, access to water resources must be promoted on an equitable basis.[358] Equity requires not only that access to water resources is provided between users of the present generation, but it also requires that the needs of future generations are taken into account.[359] This chapter further showed that substantive equality is required, which allows for the differentiation between users.[360] In addition, the furthering of equitable access to water is intimately linked to the promotion and satisfaction of human dignity.[361] The requirement for the state to justify its decisions by showing that water is beneficially used in the public interest was discussed.[362]

The third component of this chapter focused on the importance of introducing efficient mechanisms in the context of the management of water resources and provision of water services. In this respect, the deficiencies in the current physical and institutional infrastructure were highlighted.[363] In addition, financial[364] and technical inefficiencies within the water management sector were highlighted.[365]

[354] Note 53 above.

[355] Note 63 above.

[356] Note 104 above.

[357] See discussion at Ch 8 below (note 157).

[358] Note 124 above.

[359] Note 138 above.

[360] Note 144 above.

[361] Note 182 above.

[362] Note 235 above.

[363] Note 246 above.

[364] Note 295 above.

[365] Note 305 above.

Finally, the principles of cooperative governance,[366] as well as cooperation between the private and public sector were discussed,[367] to show how these relationships are both integral to the functioning of the water sector, as well as necessary for the promotion of the efficiency thereof.

The legal framework of water management has been discussed, as well as the substantive features that inform the duties of trusteeship. The focus of the following chapter is to evaluate the practical implementation of trusteeship.

[366] Note 309 above.

[367] Note 328 above.

Chapter Six:

PRACTICAL BASIS FOR WATER MANAGEMENT

1. Introduction

Natural resources, within the global context, are perceived in many societies as essential, not only to human life, but 'the economy, social justice, and national security'.[1] The importance of water for the development and survival of humans has prompted the recognition of the water cycle as a unitary process, as well as an appreciation of the importance of water within the context of the ecosystem.[2] However, there is only a finite amount of water available in a closed system, and the rate of human population growth is not stable.[3] It is expected that the rate of water use and the human need for water will continue to increase exponentially,[4] while the volume of water available to sustain this population remains the same.[5] The consequence of this is a per capita decrease in water availability over time.[6]

By 2020, it is anticipated that the quantity of blue water[7] will no longer be sufficient to satisfy human needs, and up to 50% of the world's population could

[1] Ö Bodin and C Prell (eds) *Social Networks and Natural Resource Management* (2011) 3.

[2] G Jewitt 'Can Integrated Water Resources Management sustain the provision of ecosystem goods and services?'(2002) 27 *Physics and Chemistry of the Earth* 888.

[3] J Mysiak *et al* (eds) *The Adaptive Water Resource Management Handbook* (2010) 1; ÖBodin and C Prell (note 1 above) 3.

[4] J Mysiak (note 3 above) 1; Ö Bodin and C Prell (note 1 above) 3. See also T D Fletcher and A Deletic (eds) *Data Requirements for Integrated Urban Water Management* (2008) 1; C Sullivan 'Calculating a water poverty index' (2002) 30 *World Development* 1196.

[5] J Mysiak (note 3 above) 1; Ö Bodin and C Prell (note 1 above) 3; T O Randhir and A G Hawes 'Ecology and poverty in watershed management' in J C Ingram, F DeClerck and C R del Rio (eds) *Integrating Ecology and Poverty Reduction* (2012) 114.

[6] J Mysiak (note 3 above) 1; T O Randhir and A G Hawes (note 5 above) 114.

[7] See Ch 1 (note 62 above).

be faced with water scarcity.[8] What compounds this problem even further is the rate of industrialisation and mechanisation around the world as many countries rely on production for economic survival. The manufacturing process requires vast amounts of water, which is not returned to an acceptable condition for human use and consumption. The pollution of water further reduces the quantity of water available. In addition, water cannot be contained within the boundaries of a nation. As a result, the water usage of neighbouring countries, particularly those upstream, will impact heavily on their surrounding counterparts.[9] The image below demonstrates the percentage of low rainfall across South Africa.

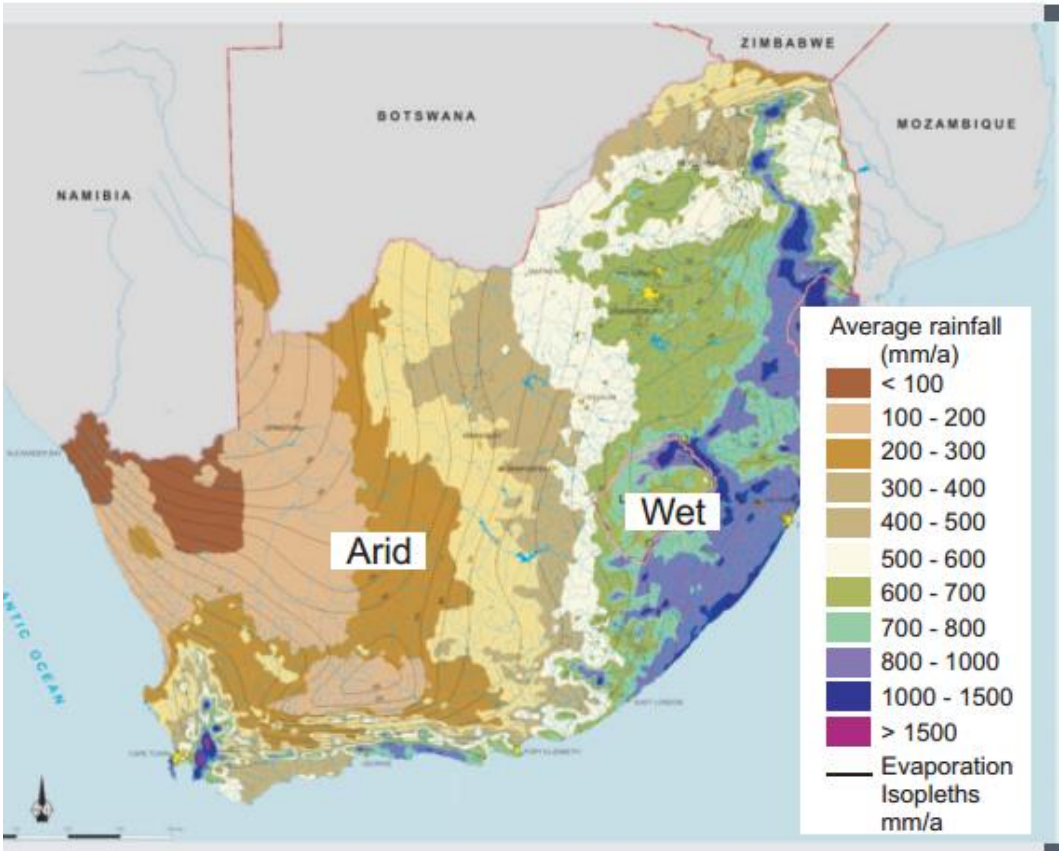

Figure 5: Rainfall patterns in South Africa[10]

The consequences of overconsumption and water pollution can be avoided if effective regulatory systems and management approaches are implemented to

[8] C M Figuères, J Rockström, C Tortajada (eds) *Rethinking Water Management* (2003) 1.

[9] J Mysiak (note 3 above) 1- 2.

[10] Strategy (2013) Annexure B 3.

manage the uses of water.[11] Contemporary approaches recognise that water resources must be viewed within their 'natural, social, economic and political environment'.[12] The necessity and urgency of an appropriate regulatory regime has been recognised by the international community,[13] and the concepts of Integrated Water Resource Management ('IWRM') and Adaptive Management have been proposed as potential management systems to address these concerns.[14] These management systems recognise 'that complexity, variation, and uncertainty are inherent properties of linked social and natural processes, and that natural resource management strategies must somehow reflect these properties in the pursuit of sustainability'.[15]

IWRM is a systematic approach to the management of water and is concerned with ensuring a governance system that is coordinated and integrated in its approach to natural systems.[16] The underlying basis of IWRM is an appreciation of natural systems as complex, adaptive systems, or 'open systems that interact with their environment'.[17] These systems are dynamic and responsive to change.[18]

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[11] J Mysiak (note 3 above) 2.

[12] H Thompson *Water Law: A Practical Approach to Resource Management and the Provision of Services* (2006) 162.

[13] See for example the World Commission on Dams (2000); the World Summit on Sustainable Development (2002); the World Water Forum (2003, 2006); the Millenium Development Goals (UN, 2000) as cited in J Mysiak (note 3 above) 2; W Medema, B S McIntosh and P J Jeffrey 'From premise to practice: a critical assessment of integrated water resources management and adaptive management approaches in the water sector' (2008) 13 *Ecology and Society* 1.

[14] H Thompson (note 12 above) 162; T Fletcher and A Deletic (note 43); G Jewitt (note 2 above) 890.

[15] W Medema, B S McIntosh and P J Jeffrey (note 13 above) 2. See also L J Kotzé 'Environmental Governance' in A Paterson and L Kotze (eds) *Environmental Compliance and Enforcement in South Africa* (2009) 107 who states that 'the very nature of the environment has compelled a departure from the traditional fragmented, silo-based and reductionist approach to the environment'. A Gowlland-Gualtieri 'South Africa's water law and policy framework: Implications for the right to water' (2007) 3 *International Environmental Law Research Centre* 3.

[16] R D Walmsley, J J Walmsley and C Walmsley 'Testing and development of catchment sustainability indicators' (2004) *Report to the Water Research Commission* 1; M Wade 'Development of a system dynamics model for the implementation of IWRM in South Africe: Phase I – deriving performance indicators for IWRM implementation on a catchment scale' (2011) *Report to the Water Research Commission* 6.

[17] See J Rotmans and D Loorbach 'Towards a better understanding of transitions and their governance' in J Grin, J Rotsmans and J Schot (eds) *Transitions to Sustainable Development* (2010) 116.

Adaptive Management is a key feature of IWRM, and requires a flexible decision-making process that is holistic rather than compartmentalised.[19] Adaptive Management 'acknowledges the complexity of the systems to be managed and the limits in predicting and controlling them'.[20] It is concerned with embracing and reacting to the uncertainty of these natural systems, and learning there from, and is more centred on 'organisational learning'.[21] It further recognises that a top-down, market-related approach to water management is unsustainable. In addition, the decision-making process cannot be confined to specific departments and other stakeholders must be included and considered.[22]

IWRM was first recognised in 1977 by the Mar del Plata Action Plan of the UN Conference on Water, and later at the International Conference on Water and the Environment in Dublin.[23] The principles established at these conferences recognised the finite nature of water and its value both to human life and the environment. They also acknowledge the economic importance of water, as well as the central role that women play in relation to the decision-making process. Finally, the principles aimed to give effect to participatory democracy. These principles featured heavily in Agenda 21, which was adopted at the Rio Earth Summit in 1992.[24] These principles are all incorporated into South Africa's water management regime.[25]

These management approaches, namely IWRM and Adaptive Management, have been adopted by South Africa and are incorporated into the legal framework by the National Water Act, the Water Services Act and the Strategy.[26] Given that the

[18] See J Rotmans and D Loorbach (note 17 above) 116 – 117.

[19] J Mysiak (note 3 above) 7.

[20] J Mysiak (note 3 above) 7.

[21] W Medema, S McIntosh and P J Jeffrey (note 13 above) 17.

[22] J Mysiak (note 3 above) 4.

[23] J Mysiak (note 3 above) 5; T D Fletcher and A Deletic (note 4 above) 1.

[24] J Mysiak (note 3 above) 5.

[25] See Ch 5 (note 27 above).

[26] S Movik and F de Jong 'Licence to control: implications of introducing administrative water use rights in South Africa' (2011) 7/2 *Law, Environment and Development Journal* 68.

state, as the trustee of water resources, is responsible for the management of water, these approaches are to be put into practice in implementing the principles of trusteeship, as set out in Chapter 5. These concepts will now be discussed, as well as their implementation within the context of the South African legal framework.

2. Integrated Water Resource Management (IWRM)

The Strategy is focused on developmental water management[27] and provides that IWRM is the basis of the approach to water management.[28] It further highlights the importance of IWRM, both in the domestic and international context. In terms of South Africa's shared water sources, IWRM must be applied consistently with domestic legislation, as well as international water protocols and agreements.[29] IWRM is also relevant in the context of the delineation of power to catchment management agencies, as this is a feature of IWRM generally.[30] In this respect, South Africa has established nine catchment management areas in terms of the relevant water basin areas.[31] Finally, IWRM also aims to value water as an economic good.[32] In this regard, the Strategy states that an expert panel is to be created with the intention of reviewing the pricing structure for the provision of raw and bulk water services.[33] The Strategy notes that South Africa currently undervalues water and charges too little for the resource.[34] This must be juxtaposed with the constitutional requirement of access to water, particularly in

[27] National Water Policy review (2013) 5.

[28] Introduction to the Strategy (2013); M Kidd *Environmental Law* 2ed (2011) 84.

[29] Strategy (2013) 80.

[30] S Movik and F de Jong (note 26 above) 68. See also N L Engle, O R Johns, M Lemos and D R Nelson 'Integrated and Adaptive Management of water resources: tensions, legacies, and the next best thing' (2011) 16 *Ecology and Society* 2.

[31] See Ch 3 (note 283 above).

[32] S Movik and F de Jong (note 26 above) 68.

[33] Strategy (2013) 69.

[34] Strategy (2013) 72.

light of the many South Africans who would not be able to pay for water if it was charged for, and/or charged for at a higher rate.[35]

IWRM views the water systems within, not only their greater organisational framework, but also the natural landscape within which they are situated, therefore taking a holistic view of the ecosystem.[36] As stated in Chapter 5, management decisions are required to take into account the broader ecosystem in order to further the goals of sustainability, environmental protection and preservation.[37] IWRM thus seeks to manage water within its hydrological cycle, as required by the Act.[38] This distinguishes it from the preceding legal framework, where water management was compartmentalised in terms of ground water, wastewater, storm water and water supply.[39]

These regimes also focused on single systems without taking into account the broader context within which they operated.[40] The objective of previous regimes was to focus on the quantitative output of a single system, for example, profit or yield.[41] However, IWRM instead focuses on the observable features of the system, such as sustainability.[42] In this manner, the characteristics of a particular system can be monitored over time to evaluate the extent to which sustainability is achieved.

Additional ways in which the promotion of a holistic approach to water management is undertaken is through the promotion of cooperative governance by

[35] See discussion at Ch 5 (note 218 above).

[36] T D Fletcher and A Deletic (note 4 above) 3; D Fisher *The Law and Governance of Water Resources* (2009) 323.

[37] See Ch 5 (note 4 above).

[38] S Movik and F de Jong (note 26 above) 68.

[39] See Ch 3 (note 229 above).

[40] J R Ehrenfeld *Sustainability by Design* (2008) 183.

[41] J R Ehrenfeld (note 40 above) 183.

[42] J R Ehrenfeld (note 40 above) 183.

requiring communication and coordination between the departments.[43] The South African legal framework requires cooperative governance, not only between departments, but also between the different hierarchies of the system (that is, national, provincial and local government).[44]

IWRM acknowledges the importance of holistically managing a resource such as water, where the factors that may influence the quality and quantity thereof are unquantifiable and uncontrollable most of the time.[45] It focuses on the interaction of various components in the water cycle including their different uses.[46] This holistic approach to water management is no easy feat, and the essential ingredient is reliable data.[47] This approach is labour-intensive, as it requires administrators to consider vast quantities of data, on an ongoing basis.

Both the National Water Act and the Water Services Act require the Minister to establish a national information system on water resources and water services in the country.[48] This duty requires the collection of data for the purposes of monitoring, development and implementation of national policy.[49] The goal of this process in the context of IWRM, namely obtaining and processing data, is to identify trends and processes that result in greater efficiency and sustainability.[50] Changes to the water management system may have unintended results, either positive or negative, that would go unidentified if a compartmentalised approach was to be adopted.

[43] See Ch 5 (note 309 above). R Pejan, D du Toit and H Thompson 'Norms for policy implementation lags in the South African water sector' (2011) *Report to the Water Research Commission* 33.

[44] See Ch 3 (note 188 above).

[45] J Mysiak (note 3 above) 17.

[46] T D Fletcher and A Deletic (note 4 above) 1.

[47] T D Fletcher and A Deletic (note 4 above) 1; R D Walmsley, J J Walmsley and C Walmsley (note 16 above) 1.

[48] S 67 Services Act.

[49] S 68 Services Act

[50] T D Fletcher and A Deletic (note 4 above) 3.

An example provided by Fletcher shows this relationship. If the state were to introduce efficiency measures in order to reduce the demands on water supply, one would expect positive results as this pressure was eased. However, if for example, the waste water system has been specially designed to function by anticipating a certain volume of daily wastewater, then the unexpected reduction in water to the facility could negatively impact the system in place. As a result, communication and planning between the different departments is necessary before making changes in one system that could potentially affect the functioning of others.

A further requirement for the success of IWRM is that all stakeholders need to cooperate, as well as share data, in order to function in tandem towards water management goals.[51] This requires trust between participants and an ability to work together. In order to facilitate this kind of relationship, transparency and accountability must be encouraged between the stakeholders. The proper collection of data will rely on good leadership, public participation, transparency and accountability, and the sharing of collected data in order to ensure true stakeholder participation.[52] Furthermore, community involvement and public participation are necessary to ascertain the cooperation and assistance from local stakeholders. Whilst the goals of public participation, transparency and accountability are constitutionally mandated, the state has difficulty meeting the required standards.[53]

In order to collect data, the parameters and nature of the study, as well as the objectives thereof, must be clearly defined. This includes identifying the spatial and temporal parameters thereof, that is, the geographical area and duration of the study. These parameters must anticipate the uncertainty of the data, but also establish permissible boundaries for this uncertainty. The contents or variables of the study must also be set out. The manner in which data is to be collected must be identified, and verification thereof is important. While the collection of data is

[51] T D Fletcher and A Deletic (note 4 above) 4.

[52] T D Fletcher and A Deletic (note 4 above) 26 – 27.

[53] See discussion below at Ch 7 (note 54).

largely a technical process, it will have no meaning unless the necessary information is extrapolated from the data.[54] It follows, therefore, that it is necessary for this data to be interpreted by persons with the requisite skills. As was discussed in Chapter 5, one of the major flaws of the system of water management is a lack of skills and expertise, as well as insufficient institutional memory.[55] Consequently, a management approach which requires vast quantities of data to be collected and analysed may not be practically possible.

An element of uncertainty is essential to IWRM and a linear approach to decision-making is therefore an inappropriate method of analysis, as it does not allow for the criteria to be changed as new information becomes available.[56] Instead, cycles of data collection and analysis are required with an appreciation that the objectives of the study can vary or change along the way, thus requiring a high degree of flexibility.[57] However, this must always be within the parameters of flexibility, as established at the outset of the study. The distinction between data collection and analysis is also conflated in practice as the process is interactive and will consist rather of feedback loops.[58] It thus requires a system that is easily capable of evolving in accordance with changing criteria.[59]

The National Water Act, the Water Services Act as well as the Strategy enable the implementation of IWRM by requiring the establishment of catchment management agencies, as well as the acquisition of complete and reliable information.[60] Water service authorities and water service providers, as the suppliers of water services at a local government level, are required to ensure that

[54] For a detailed discussion on each of these stages, see T D Fletcher and A Deletic (note 4 above) 22 – 25.

[55] See note 241 above.

[56] T D Fletcher and A Deletic (note 4 above) 167 – 168.

[57] T D Fletcher and A Deletic (note 4 above) 167. See also J R Ehrenfeld (note 40 above) 185; W Medema, B S McIntosh, and P J Jeffrey (note 13 above) 4 – 5.

[58] T D Fletcher and A Deletic (note 4 above) 167. See also See J Rotmans and D Loorbach (note 17 above) 116; W Medema, B S McIntosh and P J Jeffrey (note 13 above) 9.

[59] See J Rotmans and D Loorbach (note 17 above) 117 – 122.

[60] Strategy (2013) 63.

their planning is consistent with the goals of water management generally.[61] The Strategy requires a rational approach to planning between the various levels of government and the manner in which this is to be achieved is through the implementation of IWRM,[62] and the promotion of the principles of cooperative governance.

3. Adaptive Management

Adaptive Management is a 'systematic approach in improving management and accommodating change by learning from the outcomes of management policies and practice'.[63] In essence, Adaptive Management allows decision-makers continuously to test and experiment in the context of uncertainty, to improve the governance of natural resources.[64] As a result, it 'provides added value [to IWRM] through explicitly embracing uncertainty'.[65] It has been introduced as a result of an appreciation that water is a highly complex system and traditional management models are no longer appropriate.[66]

Adaptive Management is popular as a contemporary way of dealing with the uncertainty of natural resources 'because it acknowledges that managed resources will always change as a result of human intervention, that surprises are inevitable, and that new uncertainties will emerge'.[67] In order to manage resources efficiently, Adaptive Management allows for 'learning by doing' – policy-making that is flexible in the face of these surprises. Proponents of Adaptive Management argue that for it to be successful, two requirements must be satisfied. In the first

[61] Strategy (2013) 68.

[62] Strategy (2013) 68.

[63] J Mysiak (note 3 above) 12; W Medema, B S McIntosh and P J Jeffrey (note 13 above) 6.

[64] W Medema, B S McIntosh and P J Jeffrey (note 13 above) 7.

[65] J Mysiak (note 3 above) 7 and 183.

[66] J R Ehrenfeld (note 40 above) 890.

[67] L Gunderson 'Resilience, flexibility and Adaptive Management – antidotes for spurious certitude?' (1999) 3 *Conservation Ecology* 2. See also G Jewitt (note 2 above) 889; J Mysiak (note 3 above) 183; W Medema, B S McIntosh and P J Jeffrey (note 13 above) 7.

instance, it requires resilience of the ecosystem, and secondly, flexibility of the decision- and policy-making process.[68]

In broad terms, resilience refers to an ecosystem's ability to withstand changes caused by human behaviour.[69] The use of natural resources by humans affects the surrounding ecological system often in unforeseen ways. While this occurs quite quickly in some instances, for the most part these ecological shifts take place quite slowly over time.[70] Management of ecosystems should aim to increase the resilience of a system as this will in turn increase the ability of the ecosystem to withstand disturbances and return to equilibrium.[71]

One of the ways in which the state has attempted to ensure that water resources are kept in equilibrium is to establish minimum quantities of water necessary for human and ecological purposes. The National Water Act introduced the concept of the Reserve for the purpose of establishing the 'resource base', which is the absolute minimum amount of water required to maintain a 'level of ecological integrity and function', in order to ensure the resilience of an ecosystem.[72] The Reserve, in turn, has two stages of management: Resource Directed Measures ('RDM') are adopted, which include the classification of water sources and establishment of the Reserve, as well as the 'setting of resource quality objectives';[73] in addition, Source Directed Controls ('SDC') are implemented, which regulate the 'sources of impacts on water resources such that the objectives for resource protection are achieved'.[74] Thus, the Reserve establishes a minimum water supply (or status of equilibrium) that must be ensured to satisfy the water

[68] L Gunderson (note 67 above) 2; R Pejan, D du Toit and H Thompson 'Norms for policy implementation lags in the South African water sector' (2011) *Report to the Water Research Commission* 26 – 27.

[69] For an in depth discussion on resilience, see L Gunderson (note 67 above) 7.

[70] L Gunderson (note 67 above) 3.

[71] G Jewitt (note 2 above) 889.

[72] G Jewitt (note 2 above) 892.

[73] G Jewitt (note 2 above) 892.

[74] G Jewitt (note 2 above) 892; R Pejan, D du Toit and H Thompson 'Norms for policy implementation lags in the South African water sector' (2011) *Report to the Water Research Commission* 5.

needs of both humans and the environment, thereby setting the minimum basis of water requirements within an ecosystem.

Thus, Adaptive Management aims to manage a resource flexibly to achieve stability of the system. However, where variances in an ecosystem occur, decision-makers can react in three different ways. In the first instance, managers may wish to do nothing where an ecosystem is changing because of human behaviour, in the hope that the system is resilient and will return to equilibrium unsupported. The second approach is to intervene actively and try to restore the system to equilibrium through human intervention. Thirdly, managers may have to acknowledge that the ecosystem has been permanently altered and a new management approach will have to be introduced.[75]

While there are different responses that managers may take, Adaptive Management allows this decision-making process to take place with incomplete information. It also allows for decisions to be made purely for research purposes, in order to acquire additional information. Adaptive Management requires continuous information-gathering of the systems in place. With the acquisition of new information, decisions can be updated in order to improve systems.[76] The focus is therefore on learning, from a variety of sources, including historical data, local community knowledge and scientific indicators.[77] Given the severe skills shortage in the water sector as described earlier in this thesis, the water sector urgently needs to address this deficit, as without the relevant, processed data, decision-makers will be unable to implement Adaptive Management effectively.[78]

It is not only the skills shortage that presents a barrier to the implementation of Adaptive Management. An additional problem with Adaptive Management in

[75] L Gunderson (note 67 above) 4.

[76] J Mysiak (note 3 above) 7 - 8.

[77] J R Ehrenfeld (note 40 above) 187.

[78] See discussion above at Ch 5 (note 305).

South Africa is the inability for the various stakeholders (such as scientists and the state) to agree to the implementation of IWRM in the first place.[79]

Further, the inherent uncertainty necessary for Adaptive Management is problematic, as flexibility in a legal system necessarily undermines legal certainty.[80] This uncertainty is not unique to the management of water in South Africa, but is an uncertainty felt with resources management generally throughout the world.[81] This practical phenomenon notwithstanding, rules, laws and policies are premised on the necessity to create certainty between the various stakeholders in society. Certainty is an important component of a legal system, as it guides the actions and decisions of the public. It is also easier to monitor an administrator's compliance with fixed rules. However, the courts have acknowledged the importance of flexibility to the proper functioning of a legal system. While the law provides the framework within which to operate, discretion allows decision-makers to react appropriately to different contexts and circumstances, thereby promoting fairness.[82]

Uncertainty may also be undesirable for political reasons. Decision-makers may be unwilling to take risks in the event that the risk will result in failure, and the process of experimentation can also be expensive and time-consuming – factors which over a short-term political period may be difficult to justify to voters.[83] Thus, Adaptive Management requires a political context that embraces long-term planning, as the learning process is required to take place over a long period of time. As a result, it will not function well in a political system where policies are

[79] G Jewitt (note 2 above) 893.

[80] L Gunderson (note 67 above) 7. See also C Hoexter *Administrative Law in South Africa* 2ed (2012) 46.

[81] L Gunderson (note 67 above) 2.

[82] H R Hahlo and E Kahn *The South African Legal System and its Background* (1973) 35; C Hoexter (note 80 above) 46 – 48; *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) para 53; G E Devenish *A Commentary on the South African Bill of Rights* (1999) 16, 24 - 25.

[83] W Medema, B S McIntosh and P J Jeffrey (note 13 above) 9.

changed every few years.[84] The Department has however been praised for its long-term approach to water management.[85]

As discussed earlier in this thesis, the precautionary principle requires a cautious approach to decision-making to be adopted, and this in turn requires an ongoing assessment of the situation.[86] This principle underlies Adaptive Management, which, at its core, also entails an ongoing decision-making process that can factor in new information in the face of uncertainty. In particular, the precautionary principle features in South Africa in the context of climate change,[87] as this is one of the factors that undermine the certainty of South Africa's water supply.[88] A specific Strategy aimed at the management of climate change is currently being developed, titled the 'Climate Change Response Strategy for Water Resources in South Africa'.[89] In order to manage these long-term uncertainties, the current Strategy expressly makes provision for the implementation of Adaptive Management.[90]

The Strategy adopts an approach to decision-making in this respect that is centred on flexibility and learning. The Strategy also highlights the importance of information-gathering and consistent reporting and aims to strengthen these aspects.[91] In addition, it recognises the importance of accurate and current information in order to appreciate the status of water quality and quantity.[92] It further states that institutional capacity will need to be strengthened to deal with

[84] L Gunderson (note 67 above) 7.

[85] M Muller 'New Strategy highlights value of planning and partnerships' *Business Day* 12 July 2013.

[86] See Ch 5 (note 54 above); E Fisher, J Jones and R von Schomberg *Implementing the Precautionary Principle* (2006) 115; N de Sadeleer *Environmental Principles: From Political Slogans to Legal Rules* (2005) 179.

[87] See Ch 1 (note 46 above).

[88] B Schreiner, G Pegram and C von der Heyden 'Reality check on water resources management: Are we doing the right things in the best possible way?' (2009) 11 *Development Planning Division (Working Paper Series)* 119.

[89] Strategy (2013) 75.

[90] Strategy (2013) 75 and 78; B Schreiner, G Pegram and C von der Heyden (note 88 above) 9.

[91] Strategy (2013) 78.

[92] Strategy (2013) 91.

'high levels of uncertainty'.[93] It highlights the importance of water conservation and demand management in this context, particularly to 'build the required resilience and adaptive capacity in society and ecosystems'.[94] In particular, the Strategy states that 'management institutions such as municipalities, water boards, CMAs,[95] international bodies and the Department[96] are designed to operate as adaptive, learning institutions'.[97]

4. Concluding Remarks

In general, IWRM, as well as Adaptive Management are challenged on the basis that while in theory the principles are sound, they fail to translate into successful management approaches in practice.[98] One of the criticisms of a holistic approach as required by IWRM is that it may result in 'large, unmanageable, and counterproductive governance systems'.[99] However, it has been suggested that the intention underlying IWRM is not the integration of these departments into one large organisation, but rather to require the integration of management efforts through cooperation and coordination between different institutions and stakeholders.[100] Another criticism of IWRM is that in practice it is difficult to implement, as it requires sufficient capacity together with the political will and adequate governance to ensure it is properly implemented.[101]

[93] Strategy (2013) 77.

[94] Strategy (2013) 77.

[95] 'Catchment management agencies' as discussed above Ch 3 (note 268).

[96] 'The Department of Water Affairs' as discussed above at Ch 3 (note 184).

[97] Strategy (2013) 77.

[98] W Medema, B S McIntosh and P J Jeffrey (note 13 above) 5; M Wade 'Development of a system dynamics model for the implementation of IWRM in South Africe: Phase I – deriving performance indicators for IWRM implementation on a catchment scale' (2011) *Report to the Water Research Commission* 7.

[99] W Medema, B S McIntosh and P J Jeffrey (note 13 above) 6.

[100] W Medema, B S McIntosh and P J Jeffrey (note 13 above) 5.

[101] W Medema, B S McIntosh and P J Jeffrey (note 13 above) 2; M Wade 'Development of a system dynamics model for the implementation of IWRM in South Africe: Phase I – deriving performance indicators for IWRM implementation on a catchment scale' (2011) *Report to the Water Research Commission* 7.

To the extent that IWRM is furthered by the decentralisation of management responsibilities to water basins, the state has also failed adequately to establish the necessary Catchment Management Agencies.[102] Consequently IWRM is not being realised at a practical level and most, if not all, decision-making processes still take place at a national level.[103] In addition, inter-governmental departments such as the Department of Water Affairs and the Department of Mineral Resources have failed to cooperate, which presents a barrier to coordinating and integrating the various stakeholders involved.[104]

Both at a national level and between the SADC countries, IWRM has been adopted.[105] The theoretical side of this adoption has been sound, with legislation, policies and plans being put into place. The Strategy has been applauded for its long-term management approach and for stepping outside the realm of politics with an ostensibly genuine intention to improve management of water over the next few decades.[106] However, it is the practical implementation of IWRM and Adaptive Management that is not yet functioning properly.[107] In this respect, Walmsley notes that IWRM is not being successfully implemented because research projects have a limited time-frame, which defeats the purpose of the collection of data on an ongoing basis as required by IWRM.[108] Further hindrances are that there is a serious shortage of skills within the Department itself and thus most of the research and data-collection is outsourced. Also, the current setup of water management is not streamlined and results in a fragmented approach where the responsible parties for the collection of information are not well-defined.[109] Thus, the criticisms outlined above resonate in the South African

[102] See discussion above at Ch 3 (note 279 above); R D Walmsley, J J Walmsley and C Walmsley (note 16 above) 20.

[103] See discussion above at Ch 3 (note 281 above).

[104] See Ch 5 (note 316 above).

[105] S Starrett *World Environmental and Water Resources Congress* (2009) 3814.

[106] M Muller 'New Strategy highlights value of planning and partnerships' *Business Day* 12 July 2013.

[107] J Mysiak (note 3 above) 180.

[108] R D Walmsley, J J Walmsley and C Walmsley (note 16 above) 20.

[109] R D Walmsley, J J Walmsley and C Walmsley (note 16 above) 20.

context where 'while the South African National Water Act is a remarkable piece of legislation that should provide for holistic management of water resources, including all the tenets of IWRM and Adaptive Management, in practice, short-term objectives are dominating the decision-making process, leading to severe degradation of the system as a whole'.[110]

An example of an area where IWRM has been implemented is the Orange River Basin, which provides water to South Africa, Lesotho, Botswana and Namibia. The complexity of managing this basin is exacerbated by the multiple users and uses of water in the region, including drinking water, as well as water for industry, forestry, agriculture, the creation of power and mining. Another consideration is that economic disparity pervades the region and as a result, access to water and the quality thereof is not equal.[111] The importance of Adaptive Management is prevalent in the context of managing water quality and reducing the damage done to wetlands in the region.[112] The scientific approaches to water management in Lesotho, as well as the collection of data by South Africa, represent some of the best practices with regard to water internationally. However, this is not true of water management in general. It has been argued that less resistance to the idea of adaptability in management decisions will greatly improve the regulation of water in the region.[113]

Given that IWRM and Adaptive Management both require a complete overhaul of the top-heavy management approaches that existed in the sector before, and given also that this overhaul requires not only a long-term commitment to change but is also resource-intensive, it is not surprising that it has not yet yielded positive results.[114] The benefits that can be derived from these management approaches

[110] J Mysiak (note 3 above) 179.

[111] J Mysiak (note 3 above) 169.

[112] J Mysiak (note 3 above) 170 and 176.

[113] J Mysiak (note 3 above) 176.

[114] R Pejan, D du Toit and H Thompson 'Norms for policy implementation lags in the South African water sector' (2011) *Report to the Water Research Commission* 18.

may justify the delay in its successful implementation.[115] The water governance organisation will require time to transform and adopt these strategies, as well as time to build an institutional memory to ensure that there is a strong leadership within the organisation and that skills are adequately transferred.[116]

The economic and social value of water, particularly in light of the future challenges that threaten the supply thereof, reinforce the importance of a tenacious and resilient attitude being adopted by a strong political leadership. Until a better management approach is suggested, one that furthers the goals of protection and preservation of water resources, whilst ensuring that societal and economic goals are not neglected, IWRM and Adaptive Management may be the best systems to implement and are therefore worth the investment.

The purpose of this chapter was to focus on the nature of the management systems that have been adopted by the legal framework. The state, as trustee, is legislatively required to implement both IWRM and Adaptive Management, and these management approaches therefore inform the manner in which trusteeship is to be applied. The theories behind IWRM and Adaptive Management aim to manage water holistically within the greater context of the environment and adequately promote the substantive principles of trusteeship, particularly those discussed in respect of sustainability such as the precautionary and preventative principle. However, the implementation of IWRM and Adaptive Management has not been successful this far, consistent with the international inability to implement these systems. Chapter 7 will discuss the checks and balances in place to ensure that the state complies with its responsibilities, as well as the remedies available to parties to pursue the state where they fail to adequately satisfy their obligations.

[115] M Wade 'Development of a system dynamics model for the implementation of IWRM in South Africe: Phase I – deriving performance indicators for IWRM implementation on a catchment scale' (2011) *Report to the Water Research Commission* 9; R Pejan, D du Toit and H Thompson 'Norms for policy implementation lags in the South African water sector' (2011) *Report to the Water Research Commission* 28.

[116] See discussion above at Ch 5 (note 306 above).

Chapter 7:

CHECKS, BALANCES AND REMEDIES FOR GOVERNANCE OF WATER

1. Introduction

Thus far, this thesis has addressed the historical development of South Africa's water law, the legislative framework that governs trusteeship as well as the substantive principles that must be realised in accordance with the duties of the state as trustee. It has also discussed the manner in which water management must be undertaken, namely using the methods of Adaptive Management and implementing a system of Integrated Water Resource Management. The previous chapters have thus focused on the context and nature of trusteeship, as well as the mechanisms for its implementation, particularly from the perspective of the state. The methods and remedies available to hold the state liable where it has breached its constitutional obligations in this regard are discussed below.

There are a multitude of remedies available, not only as an incidence of democracy (for example, public participation), but also in terms of statutory law and the common law. Prior to 1994, the common law in South Africa was premised on the principles of Roman-Dutch and English law as a historical byproduct of colonisation.[1] These systems did not recognise African Customary Law, and as a result, many of the dispute mechanisms employed by African communities were ignored.[2] These included meetings between parties with the goal of settling disputes, a focus on family and community responsibility, all with the underlying basis of *ubuntu.*[3] The Constitutional Court has stated that the principle of *ubuntu* 'emphasises the communal nature of society and "carries in it

[1] S Liebenberg *Socio-economic Rights: Adjudication Under a Transformative Constitution* (2010) 5.

[2] See discussion on Africn Customary Law in the context of water at Ch 2 (note 7 above).

[3] S Liebenberg (note 1 above) 5 - 6.

the ideas of humaneness, social justice and fairness" and envelopes "the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity'".[4] The Court has also commented that these principles of *ubuntu* 'inspire much of our constitutional compact'.[5]

The Western systems introduced by Roman-Dutch and English law recognise a strict separation between public and private law relationships, which overlook the severe impact that private bodies can have on public rights. The express recognition of the horizontal application of the Constitution, however, has blurred this once-clear distinction.[6] Consequently, the courts are encouraged to ensure access to resources using the principles contained in the Constitution and an approach in terms of the 'spirit, purport and objects of the Bill of Rights' as opposed to traditional constructions of ownership and property.[7] The issue of access to water resources falls squarely within this grey area between public and private law.

The purpose of this chapter is to set out the mechanisms that are in place to ensure that the administrative duties of trusteeship are fulfilled.[8] This chapter, therefore, seeks to look at trusteeship, or, more importantly, the failure to implement trusteeship, from the perspective of water users. Proper accountability of the State is essential in the arena of water management: While the state has drastically improved the statistics regarding access to water, the same cannot be said for its scorecard on promoting issues of environmental protection or the prevention of pollution.[9] While some of this is attributable to the infrastructure inherited from

[4] *Everfresh Market Virginia* (*Pty*) *Ltd v Shoprite Checkers* (*Pty*) *Ltd* 2012 (1) SA 256 (CC) 276.

[5] *Everfresh Market Virginia* (note 4 above) 276.

[6] S Liebenberg (note 1 above) 61.

[7] S Liebenberg (note 1 above) 63.

[8] For a discussion on the use of the term 'governance' in recent literature, see L J Kotzé 'Environmental Governance' in A Paterson and L Kotze (eds) *Environmental Compliance and Enforcement in South Africa* (2009) 104 - 106. For the purposes of this thesis, governance refers to the institutions and regimes responsible for the management of water resources, in the context of state institutions.

[9] M Kidd *Environmental Law* 2ed (2011) 92 - 93.

the pre-democratic era, other issues are clearly caused by government mismanagement.[10]

The discussion here focuses on the nature of the existing democratic controls and watchdog institutions that aim to ensure that the state complies with its duties. In addition, this chapter discusses the various judicial remedies that may be pursued; more particularly, the Water Tribunal and judicial review on the basis of either administrative action or the principle of legality.[11] Alternative remedies exist in terms of criminal law, delict and neighbor law. However, these remedies have been canvassed extensively elsewhere and, due to the constraints of this thesis, will not be discussed in great detail below. The purpose of this chapter is to discuss the ways in which the state can be held liable generally, as well as more specifically in terms of trusteeship.

2. Democratic Controls

Since the introduction of the Constitution, a number of democratic features aim to ensure that the correct checks and balances are in place to regulate the conduct of the state. Relevant for the purposes of this discussion are the rights of access to information and public participation. In addition, the watchdog institutions implemented in accordance with Chapter 9 of the Constitution will be discussed below.

2.1. Justiciability

The justiciability of socio-economic rights follows from the recognition of the importance of sustainability. The Court has, in the context of sustainable development, expressed that all socio-economic rights are justiciable.[12] The right

[10] See generally M Kidd (note 9 above) 92 – 96.

[11] E van der Schyff 'Stewardship doctrines of public trust: Has the eagle of public trust landed on South African soil? (2013) 130 *South African Law Journal* 382.

[12] J Dugard 'Rights, Regulations and Resistance: The Phiri Water Campaign' (2008) 24 *South African Journal on Human Rights* 599. Prior to the introduction of the Constitution, it was argued that justiciable socio-economic rights places too much power in the hands of an unelected Judiciary, who need not necessarily promote the inherently social purposes of these provisions. See in this respect D M Davis 'The case against the inclusion of socio-economic demands in a Bill

of access to water it follows, as a fundamental human right contained in the Constitution, is justiciable.[13] The court in *BP* confirmed this position and held that[14]

> by elevating the environment to a fundamental justiciable human right, South Africa has irreversibly embarked on a road, which will lead to the goal of attaining a protected environment by an integrated approach, which takes into consideration, inter alia, socio-economic concerns and principles.

This echoes the statement made earlier by the courts that sustainable development now lies at the heart of environmental jurisprudence.[15] The court held that all rights in the Bill of Rights are equal, and the environmental right is no different. As such, it has to be weighed against the right to freedom of trade, occupation and profession,[16] as well as the right to property.[17] The court held that the balancing of these rights would be in accordance with the requirements of sustainable development found in the Constitution.[18]

Parties can approach the courts if they are acting in their own interest, acting on behalf of another person who cannot act for themselves, acting as a member of, or in the interest of a group or class of persons, acting in the public interest, and acting as an association in the interest of its members.[19] The Constitutional Court in the case of *Ferreira v Levin*[20] held that in order for one of these parties to have standing, they must show that a right in the Bill of Rights has been infringed, and

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of Rights except as directive principles' (1992) 8 *SAJHR* 475 – 490 as discussed in S Liebenberg *Socio-economic Rights: Adjudication Under a Transformative Constitution* (2010) 13. D du Toit, S Pollard and R Pejan (note 4 above) 8.

[13] H Thompson (note 39 above) 136. The right of access to justice in also contained in principle 10 of the Rio Declaration. R Ramlogan *Sustainable Development: Towards a Judicial Interpretation* (2011) 249.

[14] 144.

[15] See note 14 above.

[16] S 22.

[17] S 25; 143.

[18] *BP* 143.

[19] S 38(a) – (e). See further I Currie and J de Waal *The Bill of Rights Handbook* 6ed (2013) 78 – 84.

[20] *Ferreira v Levin NO* 1996 (1) SA 984 (CC) as discussed in I Currie and J de Waal (note 19 above) 77.

further, that they have a sufficient interest in obtaining the remedy sought.[21] Currie and De Waal argue that in order for a sufficient interest to exist, the list of parties above should at least be directly affected by the law or conduct.[22]

The justiciability of these rights requires that a hearing must be fair and publicly heard.[23] While this right is academically sound, practically the realities of litigation are that they are extremely costly and time-consuming.[24] The justiciability of these rights also does not entail that the state is under an obligation to ensure legal representation.[25] This right will be of little assistance when access to justice comes at such a high price in this country – not only is legal representation unaffordable for most, but litigation takes years if not decades to complete.[26] Even if successful in litigating against the state on the basis of a constitutional infringement, there is no guarantee that the state will actually take cognisance of the court's ruling. This is clearly an untenable situation, given that those most vulnerable to environmental injustices are also those most vulnerable in society generally.[27]

2.2. Access to Information

Access to information is a key component of a functioning democracy.[28] Without it, the goals of transparency and accountability of government cannot be fulfilled.[29] The movement towards a society empowered with socio-economic

[21] Para 160 – 168.

[22] I Currie and J de Waal (note 19 above) 78.

[23] I Currie and J de Waal (note 19 above) 711, 739 – 743.

[24] I Currie and J de Waal (note 19 above) 715.

[25] However, see the case of *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC) para 51 where the court held that the state's failure to assist a litigant enforce a court order resulted in a breach of s 34 as it deprived the respondent of a remedy. See I Currie and J de Waal (note 19 above) 716 – 717.

[26] See Ch 8 (note 200 below).

[27] M Kidd (note 1 above) 300.

[28] I Currie and J de Waal *The Bill of Rights Handbook* 6ed (2013) 692; G E Devenish *A Commentary on the South African Bill of Rights* (1999) 327.

[29] C Hoexter *Administrative Law in South Africa* 2ed (2012) 96; I Currie and J De Waal (note 28 above) 692.

rights must not view the 'landless and poor "as helpless victims, lacking the possibilities of personal moral agency"'.[30] Instead, socio-economic rights should aim to empower people - access to information and public participation in the decision-making process are integral to ensuring such empowerment occurs.[31] The Constitution, the Promotion of Access to Information Act,[32] the National Water Act,[33] and the National Environmental Management Act[34] require and facilitate access to information, often couched in directory language, which means that the decision-maker has no discretion in the matter.[35] It is incumbent upon the state to ensure that the decisions taken in the context of the management of water are made in an open and transparent manner. Furthermore, information must be made available to the public.[36]

Primarily, access to information is regulated by the Promotion of Access to Information Act. However, both the National Water Act and the Water Services Act also require this right to be fulfilled. Du Plessis states that the 'statutory and reporting obligations are particularly rigorous…and nowhere is this more evident than in the context of fresh water management'.[37] For example, any information contained in a national information system must be made available to the public, and this duty lies with the Minister.[38] This duty is not unlimited, however, as any legal obligations in terms of the access to information must still be complied with.[39] In addition, the Water Services Act requires any water services provider to facilitate access to information, provided the request is reasonable, and the

[30] *Port Elizabeth Municipality v Various Occupiers* 2004 (12) BCLR 1268 (CC) para 41 as discussed in S Liebenberg (note 1 above) 53.

[31] S Liebenberg (note 1 above) 53.

[32] 2 of 2000.

[33] 36 of 1998.

[34] 107 of 1998.

[35] See note

[36] S 2(4)(k) read with s 142.

[37] W du Plessis 'Access to information' in A Paterson and L Kotzé (eds) *Environmental Compliance and Enforcement in South Africa* (2009)

[38] S 142 of the NWA and s 67(3) of the Services Act.

[39] S 142.

requestor of the information is either a water services authority in the same jurisdiction, the provincial administration, the Minister, or a consumer.[40] Municipalities are further required to report on their progress in terms of the management of water services as well as the quality of water provided in terms of the Blue Drop Report.[41]

The Minister is also empowered by the Act to request information from private individuals or companies. This can be periodically or once-off. The reasons for accessing the information can be fairly broad, insofar as the request must be for the purposes of collecting data for monitoring and information systems, or for the protection and management of water generally.[42]

In addition to the right of access to information, the Act creates a duty to inform the public where there is a threat to life or property, in instances of poor quality of water, where a risk of flooding or drought exists, or where there is the risk of the malfunctioning or potential failure of a waterwork or dam.[43] This duty is more onerous than merely allowing access when requested.[44] This is not a closed list, and the National Water Act prescribes that this information should be provided where there is 'any matter connected with water or water resources, which the public needs to know'.[45]

Although this is a mandatory duty, it is likely to be difficult to enforce, as it still entails an element of discretion. The state has the discretion to decide whether the public needs to know something, in terms of this provision, and whether it has failed to comply with the Act in this respect will be context-specific. Furthermore, should an allegation arise that the state has failed to comply with this duty, this allegation will have to be challenged in a judicial forum. A judicial officer will then need to evaluate the nature of this discretionary decision, or lack thereof,

[40] S 23 of the Services Act.

[41] Department of Water Affairs *Blue Drop Report* (2012) 8.

[42] S 141.

[43] S 145(1)(a) – (f).

[44] S 145.

[45] S 145(1)(g).

once again raising the difficult question of managing judicial review within the context of the separation of powers doctrine.[46] Perhaps the biggest obstacle, however, is found in the difficulties associated with challenging any decision made by such a judicial officer, given the complexities involved in pursuing litigious processes.[47]

Unfortunately, government departments are failing to uphold this duty, either by ignoring requests made for information, in accordance with the Promotion of Access to Information Act, or alternatively, by refusing access to this information.[48] The three governmental departments that are the most important in terms of the protection of the environment are amongst the culprits who are failing to ensure compliance with this right. The Department of Mineral Resources has been described as 'consistently poor' in terms of their cooperation with this duty. In addition, both the Department of Mineral Resources and the Department of Water Affairs failed to comply with section 32 of PAIA in 2012, which requires them to file an annual report with the South African Human Rights Commission. The 2012 report filed by the Department of Environmental Affairs has further been deemed inaccurate by this Commission.[49]

In a survey undertaken by the Centre for Environmental Rights, it was found that the Department of Mineral Resources refused 12.5% of the applications for access to information in 2012.[50] In addition, departments and companies employ tactics to comply with PAIA, such as partially releasing information, which does not satisfactorily meet the request for information, or using PAIA as a means of ignoring the request entirely.[51] Information, which is critical to ensuring that the values of accountability and transparency are upheld in the ordinary course of

[46] See note 243 below.

[47] See note 222 ff below.

[48] See generally Centre for Environmental Rights *Barricading the doors* (2013); S Kings 'Access to environment information is being blocked, reveals report' *Mail and Guardian* 4 March 2013.

[49] Centre for Environmental Rights (note 49 above) 3.

[50] Centre for Environmental Rights (note 49 above) 2; S Kings 'Access to environment information is being blocked, reveals report' (note 48 above).

[51] Centre for Environmental Rights (note 49 above) 5; S Kings 'Access to environment information is being blocked, reveals report' (note 48 above).

democracy, such as an open registry of licenses and compliance data for example, is not available to the public.[52]

The failure of the state, both in terms of the provision of information, as well as ensuring that private bodies make information relevant to the public available, amounts to a breach of its duties in terms of the Constitution and PAIA. Insofar as trusteeship requires compliance with the Constitution, this also amounts to a breach of the duties of trusteeship. The public, armed with the ammunition of information, can provide a valuable tool to assist with the regulation and enforcement of the law as against private corporations, particularly where governments lack the human resources to do so themselves.[53] In this respect, the state may be doing itself a disservice by refusing citizens access to information.

2.3. Public Participation

The importance of public participation has been reinforced as essential in the protection of water resources,[54] and this, too, is a key feature of democracy.[55] However, facilitating genuine public participation may compromise administrative efficiency in the context of environmental management. A sincere attempt to involve the public can seriously hamper developmental goals, particularly where there is no shared vision for the community involved.[56] In addition, understanding what a community is and how it functions presents further

[52] S Kings 'Access to environment information is being blocked, reveals report' (note 48 above).

[53] E Bray 'Administrative justice' in A Paterson and L Kotzé (eds) *Environmental Compliance and Enforcement in South Africa* (2009) 197; M Kidd 'Environmental law' (1993) 4 *South African Human Rights Year Book* 121 – 122; G E Devenish (note 28 above) 327.

[54] Strategy (2013) 43; H Mackay 'Water Policies and Practices' in David Reed and Martin de Wit (eds) *Towards a Just South Africa: The Political Economy of Natural Resource Wealth* (2003) 61. See also R P Hiskes *The Human Right to a Green Future* (2009) 143.

[55] S 59(1), 72(1), 118(1). See *Doctors For Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC) para 75 – 147; C Hoexter (note 29 above) 80; B J Richardson and J Razzaque 'Public participation in environmental decision-making' in B J Richardson and S Wood (eds) *Environmental Law for Sustainability* (2006) 165; R Ramlogan *Sustainable Development: Towards a Judicial Interpretation* (2011)190 – 191.

[56] A continuum of public participation exists where on the one end processes are totally internal and participation is nil, as compared to the other end where citizens are totally in control of administrative decisions. See T D Fletcher and A Deletic (eds) *Data Requirements for Integrated Urban Water Management* (2008) 164; R Barnes *Property Rights and Natural Resources* (2009) 70.

difficulties, especially when it is acknowledged that communities are not homogenous, and have different motivations, goals and circumstances.[57]

Public participation and the decentralisation of power to the lowest appropriate level furthers the principle of subsidiarity, which, in turn, is assumed to promote accountability, transparency and democracy, and redress social inequalities.[58] Chapter 3 discussed the extent to which these principles are practically implemented through the creation of Catchment Management Agencies.[59] Brown, however, argues that the participatory approach introduced by the National Water Act may ultimately subvert the goals of subsidiarity by further entrenching inequality.[60] Participatory democracy, to some extent, presupposes a homogenous community, that is, that the community will not only strive towards the same goals, but also share the same values, and stakeholders will be on the same footing.[61] However, in South Africa, the vast inequalities that exist within the context of greatly varying heterogeneous communities may undermine this participatory process. Factors that may further detract from the legitimacy of the participatory process include the size of the area involved and the nature of the particular community.[62]

There are further problems inherent in public participation, particularly in the context of highly scientific information. The nature of scientific information is such that it is not always readily accessible or digestible.[63] There has also been

[57] K Bakker 'The 'commons' versus the 'commodity': alter-globalization, anti-privatization and the human right to water in the Global South' (2007) 39 *Antipode* 444; P A Harvey and R A Reed 'Community managed water supplies in Africa: sustainable or dispensable' (2007) 42 *Community Development Journal* 368; G R Backeberg 'Water institutional reforms in South Africa' (2005) 7 *Water Policy* 118.

[58] J Brown 'Assuming too much? Participatory water resource governance in South Africa' (2011) 177 *The Geographic Journal* 172.

[59] See discussion at Ch 3 (note 268 above).

[60] J Brown (note 58 above) 171.

[61] J Brown (note 58 above) 173.

[62] J Brown (note 58 above) 173.

[63] T Field 'Public participation in environmental decision-making: *Earthlife Africa (Cape Town) v Director General: Department of Environmental Affairs and Tourism*' (2005) 122 *South African Law Journal* 758; *Earthlife Africa (Cape Town) v Director-General: Department of*

reticence on the part of the state to be truly transparent and involve the public in all stages. An example of this can be seen in *Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs & Tourism and Another*,[64] where it became clear that the state only anticipated providing for public participation once critical decisions had already been made.[65] The challenge, as Fields states, is to 'sustain […] a level of public debate concerning issues of major importance such that members of the public can make an informed, rational choice about whether to accept a new development'.[66] Another aspect to guard against is the fact that public participation can result in the state responding to those who have the time, expertise and funding to pursue participation as opposed to the 'unorganised, the demoralised, the unfashionable and the underprivileged'.[67]

The benefits of public participation, however, necessitate a sincere attempt on the part of the state to achieve its proper implementation.[68] In the first instance, in the process of collecting information,[69] the local community can be of great assistance in explaining practices, norms and sharing traditional knowledge.[70] Traditional practices established over long periods of time may in some instances be better suited to further the purposes of sustainability than suggestions brought in by

Environmental Affairs and Tourism and Another 2006 (10) BCLR 1179 (C) para 73, the Director-General of the Department of Environmental Affairs and Tourism submitted that

> 'the documents submitted to the department deal with "highly complex matters of a scientific and technical nature" and unless he were to rely on expert advice in that regard, he would not be able honestly and effectively to apply his mind to those issues. It was specifically for this purpose that a panel of experts was appointed to advise the DG with regard to Eskom's application herein'.

[64] 2006 (10) BCLR 1179 (C).

[65] T Field (note 63 above) 763.

[66] T Field (note 63 above) 764.

[67] C Hoexter (note 29 above) 84 citing D Atkinson *Techniques of Public Participation in Local Government* Electoral Institute of South Africa (1997) 12.

[68] M Kidd (note 53 above) 122.

[69] See Ch 6 (note 48 above).

[70] J R Ehrenfeld *Sustainability by Design* (2008) 186; M I Msibi and P Z Dlamini 'Water allocation reform in South Africa: History, processes and prospects for future implementation' (2011) *Report to the Water Research Commission* 118.

outsiders, with little knowledge of the local, practical realities.[71] This value has been identified by the Strategy, as the coping mechanisms that local communities implement to reduce their vulnerability to climate conditions are to be taken into account by decision-makers.[72] Secondly, for environmental programmes to work, it is often necessary for the communities affected by them to buy into these ideas.[73] Public participation assists in this process by involving and educating the community, with the effect of community buy-in. Finally, as part of the commitment to democracy and constitutional reform, public participation is essential to promoting social justice, and this in turn may enhance the legitimacy of state programmes and policies.[74]

Other stakeholders that can play a valuable role in public participation are NGOs.[75] One of the focus areas of Agenda 21, in its attempt to achieve sustainable development, is to drive real community involvement and public participation.[76] This requires involvement from all sectors of the community[77] as well as the different branches of government. This in turn requires cooperation between national government, local government and non-governmental organisations. NGOs play an important role in facilitating public participation, and consequently participatory democracy, by representing interests that are independent of government and business.[78]

[71] J R Ehrenfeld (note 70 above) 186.

[72] Strategy (2013) 78.

[73] T D Fletcher and A Deletic (note 56 above) 165.

[74] T D Fletcher and A Deletic (note 56 above) 165. See also C Hoexter (note 29 above) 81.

[75] See discussion above at Ch 5 (note 332 above).

[76] Agenda 21 section III para 26. T Field (note 63 above) 761 – 761.

[77] T Field (note 63 above) 761 – 762.

[78] See, for example, the efforts of the Save the Vaal Environment, a non-profit organization dedicated to the protection and preservation of water quality of the Vaal river. They have taken on the Emfuleni municipality on a number of issues, including raw sewage discharge into the river, failure to maintain equipment and a failure to ensure adequate standards of waste discharge into the River. Despite court orders being made to compel action in this regard, the website of the organisation notes that they will be challenging the municipality for contempt of 'several of these Court orders'. See in this regard, http://www.save.org.za/content/our-successes [accessed on 11.1.2014].

The courts also regularly recognise the importance of public participation. For example, in *Mazibuko v City of Johannesburg*,[79] the court reiterated the importance of public participation and a participatory democracy in the context of litigating socio-economic rights.[80] In the process of challenging state agencies in a court forum, the state must engage in a process of justifying its actions to the public, and show that the decision-making process was reasonable.[81] Furthermore, they must show that a sincere attempt is being made progressively to realise the right in question, by evidencing that socio-economic policies are reconsidered and updated.[82] In addition to holding the state accountable through a voting system, litigation against the state holds real importance by ensuring this accountability persists throughout the political term.[83] This is consistent with the constitutional requirement for government to be 'responsible, accountable and open'.[84]

Community participation is distinguishable from community management. While the former requires involving the community in aspects of decision-making, the latter entails handing over the control of management of a resource to the community. Proponents of community management argue that this mechanism allows the community to take ownership of a project, by allowing them full responsibility over the management and control of the resource.[85] However, the reverse has proved to be true, and community management of a resource often results in, amongst other things, distrust between community members, further inequity, and the perception that the state is shirking its responsibilities.[86] As a result, this may not be a suitable method of addressing the problems inherent with the current system of management.

[79] 2010 (4) SA 1 (CC).

[80] Para 160.

[81] Para 161.

[82] Para 161.

[83] Para 160.

[84] Para 161.

[85] P A Harvey and R A Reed (note 57 above) 368 – 369.

[86] P A Harvey and R A Reed (note 57 above) 370 – 372.

The Act facilitates public participation in a number of instances. The establishment of catchment management agencies is in accordance with the principle of public participation, as it aims to reduce the necessity for state intervention[87] with the focus on a bottom-up approach as opposed to a top-heavy, centralised system.[88] This system facilitates public participation by delineating the power of water management and allowing the public to be incorporated into the decision-making process.[89] Catchment management agencies must facilitate *community* involvement in terms of the Act and they are intended actively to encourage public participation from communities and other stakeholders.[90] In exercising its functions, a catchment management agency must attempt to achieve 'cooperation and consensus in managing the water resource under its control'.[91]

Most of these instances of public participation are in the context of delegated law-making activities, and require 'notice and comment' procedures to be followed.[92] These procedures are problematic in the sense that they facilitate 'adversarial' rule-making.[93] This is because the notice and comment process is inherently competitive, which may force parties to adopt extreme positions in order to have some of their suggestions incorporated.[94] The rationale behind notice and comment procedures is to ensure that the rules can be justified to the public. It also allows the rule-making body to call on the expertise of the public and aims to

[87] Principle 22: The institutional framework for water management shall as far as possible be simple, pragmatic and understandable. It shall be self-driven and minimise the necessity for State intervention. Administrative decisions shall be subject to appeal.

[88] See the discussion at Ch 3 (note 266 above).

[89] Principle 23: Responsibility for the development, apportionment and management of available water resources shall, where possible and appropriate, be delegated to a catchment or regional level in such a manner as to enable interested parties to participate.

[90] Strategy 64.

[91] S 79(4)(b).

[92] C Hoexter (note 29 above) 82.

[93] See C Hoexter (note 29 above) 86.

[94] C Hoexter (note 29 above) 86 - 87. C Hoexter suggests that instead of only having notice and comment procedures, it may be useful to incorporate negotiated rulemaking processes, which allow interested parties to directly participate in the drafting of delegated legislation.

ensure that the rule-making body 'maintains a flexible and open-minded attitude towards proposed rules'.[95]

The duty to facilitate public participation in the context of notice and comment procedures is not discretionary, and the relevant authority *must* ensure that processes are in place to do so when necessary. The language used is consistent and gives rise to three basic requirements for public participation. In the first instance, the public must be invited and given an opportunity to comment.[96] If additional steps are required to bring the content of a proposal to the attention of any interested parties, the Minister must ensure that this is done, provided she deems the action to be appropriate.[97] Finally, the comments must be considered by the Minister.[98]

Prior to the establishment of the national water resource Strategy, or even a component thereof, public participation must be fulfilled.[99] The duty to facilitate public participation is also necessary prior to the establishment of catchment management agencies, as well as the disestablishment thereof.[100] Where the classification of a water resource is concerned, as well as the determination of the Reserve, the Minister is also obliged to publish a notice setting out the details of the proposed classification, and invite and consider commentary from interested parties.[101] The Minister must also consider and take any steps necessary to bring the proposal to the attention of interested parties.[102] Similarly, public participation must be facilitated where the Minister wants to declare an activity a controlled

[95] C Hoexter (note 29 above) 84.

[96] S 5(5)(a)(iii), s 8(5)(a)(iii), s 13(4)(a)(ii), 16(3)(a)(ii), s 36(4)(a)(ii), s 38(3)(a)(ii), s 39(4)(a)(ii), s 56(7)(a)(ii), s 69(1)(a)(ii), s 78(3)(a)(ii), s 88(2)(a)(ii), s 92(3)(a)(ii), s 96(2)(a)(iii), s 110(1)(b)(iii) of the Water Act.

[97] S 5(5)(b), s 8(5)(b), 13(4)(b), 16(3)(b), s 36(4)(b), s 38(3)(c), s 39(4)(b), s 56(7)(b), s 69(1)(b), s 78(3)(b), s 88(2)(b), s 92(3)(b), s 96(2)(b), s 110(1)(c) of the Water Act.

[98] S 5(5)(c), s 8(5)(c), s 13(4)(c), s 16(3)(c), s 36(4)(c), s 38(3)(d), s 39(4)(c), s 56(7)(c), s 69(1)(c), s 78(3)(c), s 88(2)(c), s 92(3)(c), s 96(2)(c), s 110(1)(d) of the Water Act.

[99] S 5(5).

[100] S 78(3) and s 88(2).

[101] S 13(4)(a) and (c) in respect of the classification of the water resource; s 16(3)(a) and (c) in respect of the determination of the Reserve.

[102] S 13(b).

activity,[103] or a stream flow reduction activity,[104] or if the responsible authority wishes to issue a general authorisation.[105]

Compulsory licensing can be affected where the responsible authority wishes to regulate efficient and beneficial use of the resource, promote equity in terms of water allocation, or protect the quality of the water resource.[106] The responsible authority must then consider all the applications made in light of the criteria for the award of a license, and prepare an allocation schedule that reflects the quantity of water for each user.[107] The allocation schedule must be brought to the attention of the public, and objections must be invited and considered.[108] Once an allocation schedule has been made final, the responsible authority must award the licenses in terms of this allocation schedule, and the rights in terms of this license will replace all previous water use entitlements.[109]

Where an amendment of a water use license is contemplated, the effected party(ies) must be informed and given an opportunity to be heard.[110] Similarly, where a license is to be suspended or withdrawn, the party must be informed of this action and allowed an opportunity to make representations.[111] Prior to the establishment of a pricing strategy for water use by the Minister and Ministry of Finance, the process of public participation must also be facilitated.[112]

[103] S 38.

[104] S 36(4).

[105] S 39(4). By contrast, in terms of s 43 when a responsible authority declares that a particular geographic area requires compulsory licencing, they must take steps to ensure that the public are made aware of this fact, but do not need to invite public participation.

[106] S 43(1).

[107] S 45.

[108] S 45(4).

[109] S 46 – 48. The responsible authority must first publish a preliminary allocation schedule and dissatisfied parties are entitled to appeal to the Water Tribunal. If no appeals are made in time, or a decision has been made by the Water Tribunal and the outcome has been effected, the preliminary schedule will be made final.

[110] S 49(5).

[111] S 54(4).

[112] S 56(7).

The making of regulations by the Minister in accordance with this Act must also facilitate public participation in the manner described above.[113] In addition to these requirements, the Minister must explain any action or inaction taken as a response to comments made, on request from the national Assembly, National Council of Provinces or any committees there under.[114] The assumption of powers by the Minister from a water user association, as well as their disestablishment also requires public participation.[115]

Before the construction of a waterwork, the Minister must prepare an environmental impact assessment and involve the public by affording them the opportunity to comment on the plans.[116] Prior to the establishment of mechanisms to coordinate the monitoring of water resources, the Minister must consult with not only with the relevant organs of state and water management institutions, but also with water users.[117]

The importance of public participation is highlighted throughout the Strategy. It states that in order for the Water Conservation and Water Demand Management programme to be effective, the public must be educated as to the goals of this programme, in order to achieve buy-in from society.[118] To improve water efficiency, and reduce water losses, it is necessary for the public to participate in this programme.[119]

The Act dispenses with the need for public participation in emergency scenarios or urgent situations that threaten the safety of people or property, or the protection of a water resource or the environment.[120] Under these circumstances, any notice

[113] S 69.

[114] S 69(1)(d).

[115] S 95(5) and s 96(2).

[116] S 110.

[117] S 138.

[118] Strategy (2013) 58.

[119] Strategy (2013) 58.

[120] S 67.

or publication requirements, time limits and obligations to invite and consider public comment may be legitimately ignored.[121]

Where a party has failed to pay a water use charge, the supply of water to the user may be restricted or suspended.[122] Prior to this action being taken, the person must be given an opportunity to make representations.[123] The Act does not stipulate whether it is the Minister or responsible authority that is entitled to make this decision.[124] Practically, it may be impossible for the Minister to entertain each and every matter relating to a suspension, particularly given the right to be heard. However, the restriction or suspension of a water supply is a drastic measure.

In the *Mazibuko* case, the court had to evaluate whether the state was obliged to notify parties and provide them with an opportunity to be heard before their pre-paid meters stopped the supply of water to their premises.[125] The court held that when the pre-paid meter switched off the water supply, this did not amount to a permanent discontinuation of the water supply.[126] It would either be reopened upon the loading of more credit onto the meter, or the following month when the six kilolitres of free water would be available to the household.[127] The court also held that, in this respect, the notice and comment procedures, as required by the Water Services Act prior to the discontinuation of water, was not applicable where pre-paid meters ran out of credit.[128] The court stated that the alternative interpretation of section 4(3) which would favour such an approach would amount to an 'absurd' and 'unsustainable' situation, as the state could be obliged to notify a party a few times per month whenever the meter credit was exhausted.[129] This

[121] S 67.

[122] S 59(3)(b).

[123] S 59(4).

[124] See s 59 generally.

[125] *Mazibuko v City of Johannesburg 2010 (4) SA 1 (CC).*para 121.

[126] *Mazibuko(CC)* para 120.

[127] *Mazibuko (CC)* para 121.

[128] *Mazibuko (CC)* para 123 - 124.

[129] *Mazibuko (CC)* para 122. However, cf S Liebenberg (note 1 above) 468 who argues that the court erred in its approach. The facts of this case evidence the tragedy that can arise where water

case evidences the necessity to evaluate the obligations of the state based on the circumstances at hand to ensure that unintended consequences do not arise from implementing a uniform approach.

In the *Director, Mineral Development, Gauteng Region and Another v Save the Vaal Environment and Others*,[130] the court had to deal with the interpretation of section 24 in the context of the administration of mineral rights.[131] The court held that, despite the peremptory nature of the discretion provided to the decision-maker in the context of the award of mineral rights, the public still had a right to be heard.[132] Without the express exclusion of the *audi alteram partem* rule, it could not be inferred that the rule was not afforded to the public to make representations on the issue.[133] The court also emphasised the importance of public participation by requiring the involvement of stakeholders in the preparation of guidelines.[134] These guidelines have to take into account 'international perspectives and experiences'.[135]

Where the Act is silent on public participation procedures, the PAJA may find application. Section 4 thereof requires that if an 'administrative action materially and adversely affects the rights of the public, an administrator, to give effect to the right to procedurally fair administrative action' must either hold a public inquiry or notice and comment procedure, or any alternative procedure provided it is lawful and fair.[136] Consequently, the absence of express provisions requiring

supply can be shut off without warning. Residents in the *Phiri* township desperately tried to put out a shack fire but were unable to do so, particularly after the pre-paid meter ran out of credit and shut off the water supply. Unbeknownst to the residents, two small children were sleeping inside the shack and were killed by the blaze.

[130] *Director, Mineral Development, Gauteng Region and Another v Save the Vaal Environment and Others* 1999 (8) BCLR 845 (SCA).

[131] Para 1.

[132] Para 9 to 15.

[133] Para 15.

[134] *BP* 151.

[135] *BP* 151.

[136] S 4 PAJA; C Hoexter (note 29 above) 84 – 85.

public participation in the legislative framework governing water does not necessarily entail that it is not required.

2.4. Chapter Nine Institutions

The Constitution creates a number of institutions that are aimed at the promotion of democracy, called Chapter Nine institutions. The Public Protector, South African Human Rights Commission, the Commission for Gender Equality and Auditor-General are Chapter 9 institutions that can assist in ensuring that the state complies with its duties.[137]

The Constitution states that 'these institutions are independent, and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice'.[138] The courts have confirmed that these institutions are not subject to national executive control and should be seen to be 'outside government control'.[139] The Constitution also requires all spheres of government to cooperate with these institutions in the performance of their duties, and interference is prohibited.[140]

The Public Protector is entitled to investigate any maladministration that 'is alleged or suspected to be improper or to have resulted in any impropriety or prejudice'.[141] The powers of the protector are far-ranging and include not only providing an annual report to the National Assembly, but also taking the appropriate remedial action where maladministration is found to exist.[142] The Constitution requires the public protector to be accessible to the public,[143] and any reports of the protector must be made public documents unless national legislation

[137] S 181 of the Constitution.

[138] S 181(2) of the Constitution. *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC) 27 – 31.

[139] *Independent Electoral Commission* (note 138 above) 31.

[140] S 181(3) and (4).

[141] Preamble to the Public Protector Act 23 of 1994.

[142] S 182(1)(b) and (c) of the Constitution; s 6 of the Public Protector Act 23 of 1994. C Hoexter (note 29 above) 90.

[143] S 182(4).

requires the reports to be classified.[144] In the 2010/2011 report of the Public Protector to the National Assembly, only one instance of maladministration was included in the report relevant to the governance of water.[145]

The Auditor-General is similar to the Public Protector, but its powers are limited to ensuring that public money is properly managed.[146] In the General Report on National and Provincial Audit Outcomes 2011/2012, the Department of Water Affairs received a qualified audit.[147] The root causes of the outcome of this audit were stated to be ineffective leadership, a lack of accountability, and insufficient monitoring of monthly reporting.[148] The audit also cited that poor project management in the provinces resulted in 'irregular expenditure' and non-compliance with treasury regulations.[149] Irregular expenditure in the Department of Water Affairs amounted to R1075,72 million, while fruitless and wasted expenditure amounted to R22,73 million.[150] The areas of procurement and contract management, leadership, financial and performance management and governance all received either a status of *cause for concern*, or *intervention required*.[151] The areas highlighted by this audit as problematic are key areas for water management. Proper leadership, governance and financial management are critical to the implementation of the goals of trusteeship. Without them, the goals of attaining sustainability, equity and efficiency cannot be attained.[152]

The third institution that may be of assistance in ensuring the compliance of government with its duties is the South African Human Rights Commission ('SAHRC'). The SAHRC is empowered to report on the observance of human rights, and may 'take steps to secure appropriate redress where' violations have

[144] S 182(5), s 8(2A) of the Public Protector Act; C Hoexter (note 29 above) 90.

[145] Public Protector South Africa Annual report (2010/2011) 12.

[146] S 188 of the Constitution; C Hoexter (note 29 above) 93.

[147] Auditor General of South Africa 'Audit outcomes of ministerial portfolios' (2011-2012) 182.

[148] Auditor General of South Africa (note 147 above) 418 - 419.

[149] Auditor General of South Africa (note 147 above) 419.

[150] Auditor General of South Africa (note 147 above) 423.

[151] Auditor General of South Africa (note 147 above) 423.

[152] See discussion at Ch 5 generally.

taken place.[153] However, the Department of Water Affairs is flagrantly disregarding the importance of this institution by not complying with its reporting requirements. For both the periods of 2010/2011 and 2011/2012, the Department of Water Affairs failed to submit the constitutionally required annual report to the SAHRC.[154]

Finally, the Commission for Gender Equality is empowered to further the protection, development and attainment of gender equality, and its powers include monitoring, investigating, advising and reporting on issues affecting gender equality.[155] This Commission may be of relevance to the goals of furthering gender equality in the context of water, and ensuring that women play a more central role in water management generally.[156]

3. Judicial controls

In addition to the democratic controls in place, a number of judicial mechanisms exist whereby the state can be held accountable. These include an appeal process through the Water Tribunal, judicial review on the basis of either administrative action or the principle of legality, as well as the ordinary criminal and civil remedies that may be applicable. These remedies are discussed below.

3.1. The Water Tribunal

Water Tribunals are established by the National Water Act, with the intention of providing the public with access to justice that is both speedy and cost-effective.[157] The Tribunal has the jurisdiction to adjudicate over disputes

[153] S 184(2)(a) and (b) of the Constitution.

[154] South African Human Rights Commission *The Promotion of Access to Information Act Annual Report 2011/12* (2012) 26; Centre for Environmental Rights (note 49 above) 3.

[155] S 187 of the Constitution.

[156] See Ch 5 (note 148 above).

[157] Water Tribunals are established in terms of s 146 - 149 of the Act read with Sched 6. Further, the National Water Act GN 926 of 23 September 2005: Publication of the Water Tribunal rules further defines the functioning of the tribunal. Members of the Tribunal are to be appointed by the President on recommendation of the Minister, and the involvement of the Judicial Service Commission and Water Research Commission in the appointment of members has been

pertaining to administrative decisions and directives.[158] A distinction must be made, based on the nature of the remedy sought. Generally speaking, where an administrative decision is to be re-evaluated on the merits of the decision, this should more properly be brought before an administrative body, such as the Water Tribunal.[159] In this instance, the Tribunal will effectively reconsider the merits of the decision, and is competent to decide the matter afresh.[160]

If the applicant seeks to review the decision, which requires an evaluation of the legality thereof, or the procedural fairness of the process, an order should be sought from the court.[161] The National Water Act does not give the Water Tribunal any powers to judicially review decisions that amount to administrative actions.[162] However, the courts have acknowledged the difficulty in this regard as there are no bright lines in respect of this distinction. In order to evaluate the legality of a decision, it is often necessary to investigate the merits of that decision as well.[163]

The Water Tribunal is intended to function as a judicial forum of first instance where a complaint relating to the administration of water arises. Where a party wishes to appeal an administrative decision or seeks compensation for loss as a result of the refusal to grant a license or a reduction in the allocation of water afforded to them, they may do so at the Water Tribunal. The Strategy indicates that the provisions in the National Water Act that deal with the governance of the

terminated. See Ensor, L 'Acting water tribunal to be appointed' *Business Day* 2 April 2013. See also W Ncube 'Resurrecting the water tribunal'*Mail and Guardian* 6 May 2013.

[158] W Ncube 'Resurrecting the water tribunal'*Mail and Guardian* 6 May 2013.

[159] H Thompson *Water Law: A Practical Approach to Resource Management and the Provision of Services* (2006) 604 and 613; C Hoexter (note 29 above) 104 – 105 on the essential difference between appeal and review.

[160] C Hoexter (note 29 above) 69.

[161] H Thompson (note 159 above) 604 and 613; C Hoexter (note 29 above) 61.

[162] PAJA s 1 defines the authority of the court or tribunal as 'any independent and impartial tribunal established by national legislation for the purpose of judicially reviewing an administrative action in terms of this Act'; H Thompson (note 159 above) 612 – 613. See also C Hoexter(note 29 above) 63.

[163] *Rustenburg Platinum Mines Ltd (Rustenburg Section) v CCMA and Others* [2007] 1 All SA 164 (SCA) para 31 – 32; *Carephone (Pty) Ltd v Marcus No and Others* 1999 (3) SA 304 (LAC) 33 – 37; C Hoexter (note 29 above) 110 - 111.

Tribunal are to be amended, although it has not indicated what the stated purpose of these amendments are to be.[164]

The Water Tribunal has jurisdiction to entertain a number of issues. It may hear matters relating to administrative decisions, such as the award of licenses. It may determine the amount payable where water rights are limited or withdrawn. In the context of directives issued by catchment management agencies in the context of preventing or minimising pollution, the party in question may appeal to the Water Tribunal.[165]

3.2. Judicial Review of Administrative Action

Section 33 of the Constitution gives rise to a right to just administrative action. This right requires that decisions made by administrators must be lawful, reasonable and procedurally fair.[166] Decisions taken by anyone who exercises public powers or functions may also fall within the scope of an administrative action.[167] As a result, 'the rules (or principles) of administrative justice govern the entire process of (administrative) decision-making in the state administration'.[168] The Promotion of Administration of Justice Act ('PAJA') has been enacted to give effect to this constitutional right.[169] In accordance with the principle of subsidiarity, the PAJA is therefore the primary legislation for the determination of administrative action.[170]According to section 1 of the PAJA, an administrative action is a 'decision, of an administrative nature, that is made in terms of an empowering provision, by an organ of state or by a natural or juristic person exercising a public power or performing a public function, that adversely affects rights, that has a direct, external legal effect, and that is not specifically excluded

[164] Strategy (2013) 69.

[165] S 148 of the Act; H Thompson (note 159 above) 606 – 607.

[166] S 33(1) of the Constitution.

[167] C Hoexter (note 29 above) 2.

[168] E Bray (note 53 above) 153.

[169] C Hoexter (note 29 above) 118.

[170] See Ch 3 (note 163 above).

from the definition'.[171]An administrative action can also arise where there is a failure or refusal to make a decision.[172]

The exclusions provided for by the PAJA largely eliminate executive, legislative and judicial actions from being regarded as administrative action.[173] However, a distinction must be made between the making of policy, which is not an administrative action, and the implementation of legislation, which is.[174] The implementation of policy, or the formulation of policy to implement legislation, may constitute administrative action.[175]

Decisions concerning licenses (including the award, suspension and revocation), the issuing of directives, the imposition of restrictions or conditions, amongst other things, are all examples of administrative decisions that could qualify as administrative actions.[176] In the *Mazibuko* case, the applicants sought to have a government policy relating to water use set aside, and one of the grounds for doing so was that the actions of the municipality amounted to unlawful

[171] C Hoexter (note 29 above) 197. E Bray (note 53 above) 166 – 170. Exclusions listed in the act: (*aa*) the Executive powers or functions of the National Executive, including the powers or functions referred to in ss 79(1) and 4, 84(2)(a) – (i), (k), 85(2)(b)-(e), 91(2) - (5), 92(3), 93, 97, 98, 99 and 100 of the Constitution; (bb) the Executive powers or functions of the Provincial Executive, including the powers or functions referred to in s 121(1) and (2), 125(2)(d)-(f), 126, 127 (2),132 (2), 133 (3) (b), 137, 138, 139 and 145 (1) of the Constitution;(cc) the Executive powers or functions of a municipal council; (dd) the legislative functions of Parliament, a provincial Legislature or a municipal council; (ee) the judicial functions of a judicial officer of a court referred to in s 166 of the Constitution or of a Special Tribunal established under s 2 of the Special Investigating Units and Special Tribunals Act 74 of 1996 and the judicial functions of a traditional leader under customary law or any other law; (ff) a decision to institute or continue a prosecution; (gg) a decision relating to any aspect regarding the nomination, selection, or appointment of a judicial official or any other person, by the Judicial Service Commission in terms of any law.

[172] H Thompson (note 159 above) 181.

[173] C Hoexter (note 29 above) 203.

[174] *President of the RSA and Others v SARFU and Others* 1999 (10) BCLR 1059 (CC) para 143; H Thompson (note 159 above) 169 - 171.

[175] *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister Of Public Works and Others* 2005 (6) SA 313 (SCA) para 27; *President of the RSA and Others v SARFU* (note 174 above) para 143; *Permanent Secretary, Department Of Education and Welfare, Eastern Cape, and Another v Ed-U-College (PE) (Section 21) Inc*2001 (2) SA 1 (CC) para 17 – 19; C Hoexter (note 29 above) 178.

[176] For further instances of administrative action, see H Thompson (note 159 above) 182, 185 – 188.

administrative action.[177] The court, on an analysis of the facts, held that the municipality had been exercising its executive and legislative functions in creating the policy.[178] This fell within the exclusions as established by the PAJA and so the conduct of the municipality in this respect could not be reviewed on the basis of administrative action.[179] While the creation of this policy was not subject to review, the court did assess whether the policy itself was implemented in a fair manner.[180]

The courts have developed a number of criteria to establish whether or not an action amounts to administrative action.[181] These include assessing the subject matter of the decision, whether a public duty is exercised, the source and nature of the power, and whether it involves the exercise of policy or the implementation of legislation.[182] Finally, a decision does not have to be made or finalised in order for it to qualify as administrative action.[183]

Actions that fall outside the definition of administrative action may still be capable of review in terms of either statutory law (in this instance, the National Water Act) or the Constitution.[184] Finally, the 'principle of legality provides a general justification for the review of exercises of public power and operates as a residual source of review jurisdiction'.[185] The principle of legality goes beyond administrative action to require that public power must be exercised lawfully.[186]

[177] *Mazibuko (CC)* para 127.

[178] *Mazibuko (CC)* para 130.

[179] *Mazibuko (CC)* para 131.

[180] *Mazibuko (CC)* para 132 – 134.

[181] *President of the RSA and Others v SARFU* (note 174 above); C Hoexter (note 29 above) 175.

[182] *President of the RSA and Others v SARFU* (note 174 above) para 143; see also *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 (1) SA 853 (SCA) para 34 – 37; *Permanent Secretary,* (note 175 above) para 18 - 19.

[183] C Hoexter (note 29 above) 198.

[184] C Hoexter (note 29 above) 120 - 121.

[185] C Hoexter (note 29 above) 121.

[186] *Affordable Medicines Trust and Others v Minister of Health and Others*2006 (3) SA 247 (CC) para 49; *Pharmaceutical Manufacturers Association of SA and Another: In Re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) para 19 – 20; *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) 58; C Hoexter (note 29 above) 122.

The courts have since defined this to also include that public power must be exercised rationally, which requires that 'decisions must be rationally related to the purpose for which the power was given'[187] and be made in good faith.[188]

While the scope of review, either based on administrative action or lawfulness generally, is quite broad, the judiciary should be cautious of interfering in the administrative decision-making process.[189] Judges may lack the expertise to appropriately comment on the correctness of a decision, particularly where the decision-making is of a highly polycentric or complex nature.[190] In addition, judges have not been elected, and should be wary of unintentionally usurping the power of a body that has been democratically elected to make decisions on behalf of the people.[191]

The notion of deference allows the courts the power to review the conduct of the executive and the legislature, whilst displaying respect for these branches of government.[192] The decision to intervene and the intensity with which intervention takes place will be dependent on the circumstances before the court, including the expertise required to make the decision as well as the polycentric nature of the decision.[193] Liebenberg argues that this process should be informed

[187] *Pharmaceutical Manufacturers* (note 186 above) para 85; C Hoexter (note 29 above) 124.

[188] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) para 148; C Hoexter (note 29 above) 123.

[189] D Bilchitz *Poverty and Fundamental Rights* (2007) 142 – 143.

[190] However, see Ch 8 (note 56 below). *Du Plessis v De Klerk* 1996 (3) SA 850 (CC) para 180 - 181; *Minister of Health and Others v Treatment Action Campaign and Others* (1) 2002 (10) BCLR 1033 (CC) para 38; *Minister of Health and Another v New Clicks SA (Pty) Ltd and Others (Treatment Action Campaign and Innovative Medicines SA as Amici Curiae)* 2006 (1) BCLR 1 (CC) para 313; C Hoexter (note 29 above) 149.

[191] However, see Ch 8 (note 53 below). See also the discussion of C Hoexter (note 29 above) 150 of M Pieterse 'Coming to terms with the judicial enforcement of socio-economic rights' (2004) 20 *South African Journal of Human Rights* 383 as well as S Liebenberg (note 1 above) 63 – 71.

[192] *Logbro Properties CC v Bedderson NO and others* [2003] 1 All SA 424 (SCA) para 21; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (7) BCLR 687 (CC) para 46 – 48. See C Hoexter (note 29 above) 151 – 155. However, see also S Liebenberg (note 1 above) 41 who argues that no matter the degree of deference, judicial intervention should aim to promote participatory democracy, rather than subvert the participatory process. In the *Mazibuko (CC)* judgment, she argues (at 469) that the court took 'refuge in the lack of institutional competence and legitimacy', therefore using the deferential approach to avoid substantively evaluating s 27(1)(b).

[193] C Hoexter (note 29 above) 152 - 153.

by 'pragmatic considerations' and further that this 'inquiry must be informed by the background and unique factual matrix of the particular case and its social and historical context.[194]

The National Water Act and the Water Services Act are the primary legislative sources of administrative power that government exercises in the context of water.[195] These Acts confer power to administrators to perform the day-to-day functions of management, such as the award of licenses, which would ordinarily be 'performed by the legislature or executive'.[196] The principle of subsidiarity is given effect to by the PAJA as it requires that if any other remedies exist independently of the PAJA, such as an internal legislative remedy, these must first be exhausted before turning to the PAJA.[197] However, the court in *Earthlife Africa (Cape Town) v Director General: Department of Environmental Affairs and Tourism*[198] held that section 7(2)(c) of the PAJA allowed for a deviation of this rule where it could be shown that there were exceptional circumstances allowing for an exemption and, further, that it would be in the interests of justice to do so.[199] As a result, the primary legislative sources may be circumvented provided these requirements are met.

Accountability, impartiality, efficiency and transparency are all constitutional requirements of the modern public administration.[200] In this respect, and as mentioned above, a right to lawful, reasonable and fair administrative action is contained within the Bill of Rights, and this right is given effect to by the PAJA.[201] Where an administrative action arises, the courts will judicially review the decision. If administrative conduct is unlawful, it must first be challenged as

[194] S Liebenberg (note 1 above) 59.

[195] See, generally, C Hoexter (note 29 above) 31.

[196] C Hoexter (note 29 above) 31.

[197] S 7(2)(a) and (b). See T Field (note 63 above) 764; *Earthlife Africa* (note 63 above) 22 – 45; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC) (2004 (7) BCLR 687) in para [17] at 503B-D; C Hoexter (note 29 above) 538 - 543.

[198] 2005 (3) SA 156 (C).

[199] Para 22 – 45. See also T Field (note 63 above) 754.

[200] S 195; C Hoexter (note 29 above) 58.

[201] S 33.

administrative action, provided it falls within the definition provided by the PAJA.[202] However, if it does not fall within this purview, a similar course of action can be pursued under the principle of legality.[203] One of the requirements of lawfulness is that an administrator may not exercise any powers that have not been conferred on him by the law, which usually originates from empowering legislation.[204]

A distinction must be drawn between a power and a duty.[205] As explained by Hoexter, a power enables an authority to do something, while a duty is mandatory and must be performed.[206] While a power may be discretionary, this is not an unlimited power, and it will be restricted by the constitutional duties imposed on public officers, as well as the common law duty to act in the public interest.[207] Powers can further be interpreted by the courts depending on the context and type of language used in the legislation.[208] For example, an implied power may be found to exist where the authority is required to do something, and the legislation is silent as to the ancillary powers reasonably necessary to complete this task.[209]

A power can also be discretionary or mechanical, although the latter is more akin to a duty, as the administrator must follow a certain course of action when certain criteria are met.[210] Discretionary powers afford the decision-maker flexibility to

[202] C Hoexter (note 29 above) 255.

[203] *Pharmaceutical Manufacturers* (note 186 above) para 20; C Hoexter (note 29 above) 226.

[204] S 6(2)(a)(i) and 6(2)(f)(i) of PAJA; *Fedsure* (note 186 above) para 58; *Affordable Medicines Trust* (note 186 above) para 49; *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another* para 68; *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another (Lawyers for Human Rights as Amicus Curiae)* 2012 (2) BCLR 150 (CC) para 58 – 60; *Minister for Justice and Constitutional Development v Chonco and Others* 2010 (4) SA 82 (CC) para 27 – 32; C Hoexter (note 29 above) 255.

[205] C Hoexter (note 29 above) 43.

[206] C Hoexter (note 29 above) 43.

[207] C Hoexter (note 29 above) 43.

[208] *Sutter Appellant v Scheepers Respondent* 1932 AD 165 173 – 174; C Hoexter (note 29 above) generally 43 - 45.

[209] *Makoka v Germiston City Council* 1961 (3) SA 573 (A) 582; *Johannesburg Municipality v Davies and Another* 1925 AD 395 403; *City of Cape Town v Claremont Union College* 1934 AD 414 at 420, 421; C Hoexter (note 29 above) 46.

[210] C Hoexter (note 29 above) 46.

make a decision based on the circumstances at hand.[211] This flexibility is curtailed by, at the very minimum, an implied duty to 'act according to minimum standards of legality and good administration'.[212] In addition, powers can be mandatory or directory. A mandatory power is one which, generally, uses peremptory language or is phrased as a negative.[213] Non-compliance with a mandatory power is likely to result in invalid action on the part of the administrator, where the legislation is silent as to the consequences thereof.[214] A directory provision uses permissive language and non-compliance or partial compliance will not necessarily result in invalidity.[215] The purpose of the legislation as well contextual indicators will be of paramount importance in the court's determination as to the nature of an administrator's powers.[216]

3.2.1. Lawfulness

Lawfulness is the first of the requirements that necessitates compliance in order to ensure that a decision does not fall foul of the PAJA.[217] In the first instance, legality requires that administrators must be properly appointed and qualified, in accordance with the necessary requirements.[218] Similarly, if an administrative body has not been properly established or the procedures in place for making a decision are not followed by that body, the decision of that body will be unlawful.[219] Administrators are also required to act within the bounds of their

[211] *Dawood and Another v Minister Of Home Affairs and Others;Shalabi and Another v Minister Of Home Affairs and Others; Thomas And Another v Minister Of Home Affairs and Others* 2000 (3) SA 936 (CC); C Hoexter (note 29 above) 46 – 47.

[212] In *Janse van Rensburg NO v Minister of Trade and Industry NO* 2001 (1) SA 29 (CC) para 29, the court held that it would be inappropriate for the Minister to have unlimited powers; C Hoexter (note 29 above) 47 - 48.

[213] *Sutter Appellant v Scheepers Respondent* 1932 AD 165 173; C Hoexter (note 29 above) 48 - 49.

[214] C Hoexter (note 29 above) 48.

[215] *Sutter Appellant v Scheepers Respondent* 1932 AD 165 174; C Hoexter (note 29 above) 48 - 50.

[216] Other factors that the court may consider is whether the language of the provison is couched in negative terms or uses peremptory language, as well as the nature of the provision. *Nkisimane and Others v Santam Insurance Co Ltd* [1978] 3 All SA 33 (A) 36 – 37; C Hoexter (note 29 above) 50.

[217] See generally C Hoexter (note 29 above) 252 – 326.

[218] C Hoexter (note 29 above) 256.

[219] C Hoexter (note 29 above) 257.

authority, as conferred on them by the law.[220] While these powers may be implied, they must at all times comply with the Constitution.[221]

Illegality may also arise when an administrator does not just go beyond the scope of their authority, but does not have the authority to begin with.[222] An example of this is where broad lawmaking or discretionary powers are granted to an administrator. The rationale behind this is that 'if broad discretionary powers contain no express constraints, those who are affected by [it] will not know what is relevant to the exercise of those powers or in what circumstances they are entitled to seek relief from an adverse decision'.[223] Hoexter argues that the possibility exists therefore that all delegated authority that is not informed by guidelines will be unlawful, and that this is problematic because most legislation currently confers wide, unguided discretionary powers.[224] Whether or not the action was unlawful for this reason will depend on the circumstances.[225]

The further delegation of delegated powers (or sub-delegation) is permissible to the extent that it is allowed by legislation.[226] Where legislation is silent as to these powers, they can be implied, subject to overcoming a rebuttable common law presumption against sub-delegated powers.[227] Factors that the court will consider in evaluating this presumption include the nature and extent of the conferred

[220] C Hoexter (note 29 above) 258 – 259.

[221] C Hoexter (note 29 above) 259; *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister Of Public Works and Others* 2005 (6) SA 313 (SCA) para 26.

[222] C Hoexter (note 29 above) 260.

[223] *Affordable Medicines Trust* (note 186 above) para 34; *Dawood and Another v Minister Of Home Affairs and Others;Shalabi and Another v Minister Of Home Affairs and Others; Thomas And Another v Minister Of Home Affairs and Others* 2000 (3) SA 936 (CC) para 47; I Currie and J De Waal (note 28 above) 176.

[224] C Hoexter (note 29 above) 265.

[225] *Dawood and Another v Minister Of Home Affairs and Others;Shalabi and Another v Minister Of Home Affairs and Others; Thomas And Another v Minister Of Home Affairs and Others* 2000 (3) SA 936 (CC) para 53; C Hoexter (note 29 above) 265.

[226] C Hoexter (note 29 above) 266. The Water Services Act provides that the Minister may delegate all powers subject to the following exceptions: the power to make regulations, issue directives, intervene, prescribe policy and expropriate as well as the powers to appoint members to a water board. See s 74 of the Services Act.

[227] *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another* 2007 (1) SA 343 (CC) para 81 – 82; C Hoexter (note 29 above) 268.

power.[228] For example, the nature of the power and the complexity involved in utilising the power may be considered.[229] The existence of expressly delegated powers may weigh against the existence of implied delegated powers, although this is not a fixed rule and considerations will depend on the circumstances.[230]

Other forms of unlawful conduct include unlawful dictation, which is a decision made by one official, who does not have the authority to act, and then rubber stamped by an official who is empowered to do so.[231] Similarly, conduct that amounts to allowing another party to make a decision on an administrator's behalf will be unlawful.[232]

3.2.2. Reasonableness

Reasonableness is the second of the requirements that must be satisfied to ensure that a decision is compliant with the PAJA. While the requirement of reasonableness has not been defined,[233] it is clear that rationality is one of the components thereof.[234] In order for a decision to be rational, it must be shown that it is connected to both the purpose for which it was taken and the purpose of the empowering provision.[235] It must also be connected to the information that the administrator possesses. Finally, the reasons given by the administrator for the

[228] See C Hoexter (note 29 above) generally 269 - 273.

[229] See *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)* 2006 (2) SA 311 (CC) para 281; C Hoexter (note 29 above) 269 - 270.

[230] C Hoexter (note 29 above) 268 – 269.

[231] *Walele v The City of Cape Town and others* 2008 (11) BCLR 1067 (CC) para 112 – 114; C Hoexter (note 29 above) 273.

[232] *Hofmeyr v Minister of Justice* 1992 (3) SA 108 (C) at 117F–G as discussed in *Minister of Environmental Affairs and Tourism and another v Scenematic Fourteen (Pty) Ltd* [2005] 2 All SA 239 (SCA) para 18 – 20; C Hoexter (note 29 above) 274 - 275.

[233] C Hoexter (note 29 above) 340.

[234] *Pharmaceutical Manufacturer s* (note 186 above) para 85 – 86, *Democratic Alliance and others v Acting NDPP and others* [2012] 2 All SA 345 (SCA) para 30; C Hoexter (note 29 above) 341.

[235] *Trinity Broadcasting (Ciskei) v ICASA [2006] JOL 17798 (W)* para 16 – 17; *Trinity Broadcasting, Ciskei v Independent Communications Authority of SA* [2003] 4 All SA 589 (SCA) para 21; *Rustenberg Platinum Mines Ltd (Rustenberg Section) v CCMA and others* 2007 (1) SA 576 (SCA) para 29.

decision must be related to the above.[236] The court has held that bad decisions can result in a finding by the court that the decision was not rational.[237]

In addition to rationality, in order for a decision to be reasonable it must also be proportional.[238] This requires that there is sufficient balance between the desired outcome and the means used to obtain these outcomes.[239] The factors that the court will consider in evaluating whether a decision is reasonable are the 'nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected'.[240] While proportionality is not specifically required by the PAJA, Hoexter argues that it has been introduced by the court, specifically when reviewing 'the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected'.[241]

While review proceedings are meant to focus on the procedural aspects of the decision-making process, an enquiry will in some circumstances necessarily entail a substantive investigation, for example, when evaluating whether a decision-maker has failed to apply their minds to the decision-making process.[242] In the context of reasonableness, the courts have utilised the concept of deference to ensure that the doctrine of the separation of powers is not infringed.[243] The other significant aspect of reasonableness is that it is a variable concept, and the

[236] C Hoexter (note 29 above) 341.

[237] C Hoexter *Administrative Law in South Africa* 1ed (2006) 309; *Rustenberg Platinum Mines Ltd (Rustenberg Section) v CCMA and others* 2007 (1) SA 576 (SCA) para 3.

[238] C Hoexter (note 29 above) 343 - 344.

[239] C Hoexter (note 29 above) 344.

[240] S 6(2)(h) PAJA. C Hoexter (note 29 above) 349; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (7) BCLR 687 (CC) at para 45.

[241] *Bato Star* at para 45; C Hoexter (note 29 above) 349.

[242] C Hoexter (note 29 above) 351.

[243] C Hoexter (note 29 above) 353 - 355; *Bato Star* para 48, *Foodcorp* at 210 D – H.

reasonableness of a decision will consequently depend on the circumstances of the case.[244]

3.2.3. Procedural Fairness

The third element required for a decision to be compliant with the PAJA is that it must be procedurally fair.[245] Procedural fairness requires that a complainant has the right to a fair hearing, and the presiding officer should be objective.[246] The PAJA distinguishes between procedural fairness in the context of individuals, and in the context of a group or the public.[247] In the context of individuals, the PAJA adopts a variable standard that entails evaluating the circumstances of each case to determine the fairness thereof.[248]

Procedural fairness is relevant to decision-making in the context of the National Water Act insofar as where the Act fails to provide, or is silent, on the nature of the procedures to be followed, the PAJA should be followed.[249] In addition, even where the Act is prescriptive, it is still required to be consistent with these provisions.[250]

Section 3 of the PAJA sets out certain minimum requirements for the attainment of procedural fairness. These requirements include that adequate notice of any proposed administrative action must be provided.[251] However, a deviation is permissible where the provision of notice would defeat the purpose of the administrative action.[252] The courts have provided further that the nature of the

[244] C Hoexter (note 29 above) 355; *New Clicks* para 145.

[245] S 33(1) Constitution and s 6(2)(c) of PAJA.

[246] C Hoexter (note 29 above) 362.

[247] S 3 and 4 of PAJA.

[248] C Hoexter (note 29 above) 364 - 365.

[249] C Hoexter (note 29 above) 367.

[250] C Hoexter (note 29 above) 367 - 368; *Zondi v MEC for Traditional and Local Government Affairs* 2005 (3) SA 589 (CC) para 101.

[251] S 3(2)(b)(i).

[252] *Cooper NO v FNB* [2000] 4 All SA 597 (A) para 26; C Hoexter (note 29 above) 370.

notice given must be suitable for its recipients.[253] Where the intended recipients are vulnerable, illiterate or 'legally unsophisticated', the courts have required more than the mere provision of a written notice, thereby confirming the importance of the context of the situation as decisive.[254]

An administrator is also required to provide persons with sufficient opportunity to make representations, although this does not provide that an oral representation is required.[255] Consequently, and depending on the circumstances, an opportunity to make written submissions will suffice.[256] At a minimum, the notice should contain the factual and legal assertions made by the authority, as well as any relevant information that is 'adverse or prejudicial to the person concerned'.[257]

The third requirement of procedural fairness is that once the administrative action has been taken, a clear statement thereof must be communicated to the effected parties.[258] Ordinarily, submissions or representations would be heard prior to this event, but where this is not possible, they may in certain circumstances be heard afterwards.[259] Where a right of review or appeal exists, the administrator must further communicate this information to the party timeously.[260] In addition, adequate notice must be provided to the party conveying their right to request reasons.[261]

[253] C Hoexter (note 29 above) 370 who discusses *Cape Killarney Property Investments (Pty) Ltd v Mahamba* 2000 (2) SA 67 (C).

[254] C Hoexter (note 29 above) 370 - 371; *Bushula v Permanent Secretary* (2000) (E) 855F – J; *Nkomo v Administrator, Natal* (1991) 12 ILJ 521 N, *Police and Prisons Civil Rights Union v Minister of Correctional Services* (2006) ZAECHC para 73; *Marais v Democratic Alliance* [2002] 2 All SA 424 (C) para 78; *Cape Killarney Property Investments (Pty) Ltd v Mahamba and others* (2000) 4 All SA 479 (C) para 15 – 17.

[255] S 3(2)(b)(ii) PAJA.

[256] C Hoexter (note 29 above) 371.

[257] C Hoexter (note 29 above) 376.

[258] S 3(2)(b)(iii) PAJA.

[259] C Hoexter (note 29 above) 376.

[260] S 3(2)(b)(iv) of PAJA.

[261] S 5 of PAJA.

Another factor that may be necessary for procedural fairness to be achieved is allowing a party to obtain legal representation, which will depend on the circumstances of the case, including factors such as the seriousness and complexity thereof.[262] As stated above, whether oral representations should be permitted and the format of these representations (for example, whether they should allow witnesses and cross-examination) will largely be determined on the facts of the case and the extent to which parties will suffer prejudice under the circumstances.[263] It is also not necessarily the case that the same procedure must be followed in each instance, provided that, where a deviation occurs, this is still fair.[264]

In order for a decision to be procedurally fair, it should also comply with the Regulations on Fair Administrative Procedures.[265] These regulations provide further guidance to both public inquiry and notice and comment procedures, the latter of which is specifically required under the National Water Act.[266] The PAJA sets out the requirements for a public inquiry generally, while the regulations establish the nuances thereof, including how the inquiry is to be advertised, as well as the content thereof, the language in which it should be heard, and other procedural issues pertaining to the hearing itself.[267] Where a community should be involved in a public inquiry, particularly a vulnerable or illiterate community, the regulations require that special steps must be taken to ensure their participation.[268]

Similarly, the PAJA sets out the general requirements for notice and comment procedures, which include inviting and considering comments from any parties that may be materially and adversely affected by administrative action.[269] The

[262] C Hoexter (note 29 above) 380.

[263] C Hoexter (note 29 above) 381.

[264] C Hoexter (note 29 above) 383 - 385.

[265] GNR 1022 of 31 July 2002: Regulations on fair administrative procedures, published pursuant to the Promotion of Administration of Justice Act.

[266] See above at note 96 ff.

[267] S 4(2) of PAJA and part 1, 2 and reg 3 and 4 of the Regulations. C Hoexter (note 29 above) 413 - 414.

[268] Reg 5; C Hoexter (note 29 above) 414.

[269] S 4(3)(a) and (b) of PAJA.

Regulations also set out the content of the notice and comment procedures, including the procedural requirements of the notice, as well as the information that must be contained therein in order for the notice to be considered effective.[270]

The PAJA also requires decision-makers to act impartially and without bias.[271] There is an overlap between this consideration and other requirements of the PAJA, for example, the duty to not pursue ulterior purposes.[272] In order for bias to exist, it must be shown that actual bias exists in terms of the PAJA,[273] or a reasonable suspicion of bias per the common law.[274] If it can be shown that a reasonable person in the position of the litigant would have reasonable grounds to suspect that the decision-maker may be biased, bias will be said to exist.[275] Bias includes a financial or personal interest in the decision.[276] Bias will also be said to exist where the decision-maker is prejudiced as to the subject matter or clearly aligns themselves with one side.[277] Finally, decision-makers may fall foul of procedural fairness for institutional or official bias.[278]

The broadness of the requirement for fair administrative action in the Constitution has the possibility to invite endless questioning and litigation into every administrative decision. While the PAJA itself has narrowed the types of actions that are susceptible to judicial review, Hoexter argues that the concept of variability plays an important role in ensuring that the responsibility to act fairly is not too onerous.[279]

[270] C Hoexter (note 29 above) 415.

[271] S 6(2)(a)(iii) PAJA.

[272] S 6(2)(e)(ii) of PAJA; C Hoexter (note 29 above) 451 - 452.

[273] S 6(2)(a)(iii).

[274] *BTR Industries South Africa (Pty) Ltd v Metal and Allied Workers' Union* (1992) 3 SA 673 (A) 696 and C Hoexter (note 29 above) 452.

[275] *S v Roberts* 1999 (4) SA 915 (SCA) para 32; C Hoexter (note 29 above) 454.

[276] C Hoexter (note 29 above) 454 - 456.

[277] C Hoexter (note 29 above) 456 - 458.

[278] C Hoexter (note 29 above) 458 - 459.

[279] C Hoexter (note 29 above) 404 - 406.

3.2.4. The Right to Reasons

In order for decision-making to be fair, parties are also afforded with the right to reasons, both in terms of the Constitution and the PAJA.[280] Good reasoning is intimately linked to the fairness of an administrator's actions and this is evidenced in the PAJA in a number of places, for example, the administrator's decision is required to be rationally connected to the reasons therefor.[281] In order for this right to be 'triggered', a party must allege and show that their rights were both adversely and materially affected.[282] The Regulations set out the rather onerous requirements for requesting reasons, which includes writing to the administrator concerned via either post, fax or email and specifically stipulating how their rights have been materially and adversely affected.[283] To temper this burden on potentially illiterate and vulnerable parties, the Regulations also require administrators to assist these parties with requesting reasons where it is reasonable to do so.[284]

An administrator is entitled to decline to provide written reasons, but must justify this decision to the party who requested the reasons.[285] The reasons for a decision should be communicated in such a manner that they assist the party to understand how the outcome was reached, and justify the decision-maker's behaviour.[286] In this respect, the court has held that the concepts conveyed should include the administrator's reasoning used, and the factual findings in the context of the applicable law, conveyed in a manner that is clear and understandable.[287] Where administrators fail to give reasons and have not relied on one of the justifiable

[280] S 33(2) of the Constitution and s 5 of PAJA.

[281] S 6(2)(f)(ii)(dd). See further C Hoexter (note 29 above) 484.

[282] S 33(2) of the Constitution read with s 5 of PAJA. See also C Hoexter (note 29 above) 471.

[283] Reg 27(1) and (3); C Hoexter (note 29 above) 474.

[284] Reg 27(2); C Hoexter (note 29 above) 474.

[285] Reg 28(2).

[286] C Hoexter (note 29 above) 41.

[287] *Minister of Environmental Affairs and Tourism and others v Phambili Fisheries (Pty) Ltd and another* [2003] 2 All SA 616 (SCA) para 40 citing *Ansett Transport Industries (Operations) Pty Ltd and another v Wraith and others* (1983) 48 ALR 500 at 507 (23–41); C Hoexter (note 29 above) 477.

grounds for doing so, there is a rebuttable presumption in terms of the PAJA that the administrative action lacks a 'good reason'.[288]

3.2.5. Remedies under Judicial Review

Section 8 of the PAJA sets out the permissible remedies pursuant to judicial review where the court finds that administrative decision-making falls foul of the PAJA. The court has wide-ranging powers in terms of this provision, insofar as it may make any order that is just and equitable.[289] Importantly, this list of possibilities as defined by section 8 is not exhaustive, as the wording of the Act states that the court may make *any* order, provided that it is just and equitable to do so.[290] This includes the power to make a declaratory order,[291] award an interdict (mandatory, prohibitory and structural)[292] as well as make a spoliatory order[293] and an order as to costs.[294] The court may set the administrator's decision aside and send it back to them for reconsideration.[295] The moment at which this occurs, the decision is no longer of force and effect.[296] More dramatically, and only under exceptional circumstances, the court may change the administrator's decision, or even substitute it with its own decision.[297]

The Act does not define what exceptional circumstances entail, but case law may provide guidance in this respect:[298]

[288] S 8(1)(a)(i) read with s 5(3) of PAJA; C Hoexter (note 29 above) 482.

[289] S 8(1) read with s 6(1) of PAJA.

[290] S 8(2).

[291] S 8(1)(d).

[292] S 8(1)(a)(ii), 8(1)(b), 8(1)(e).

[293] S 8(1)(e) of PAJA.

[294] S 8(1)(f).

[295] S 8(1)(c)(i).

[296] C Hoexter (note 29 above) 545 - 546.

[297] S 8(1)(c)(ii)(aa).

[298] C Hoexter (note 29 above) 553 - 557 discussing the cases of *Johannesburg City Council v Administrator, Transvaal* 1969 (2) SA 72 (T) 75H – 77C; *Hartman v Chairman, Board for Religious Objection* 187 (1) SA 922 (O) 935; *Reynolds Brothers Ltd v Chairman, Local Road Transportation Board, Johannesburg* 1985 (2) SA 790 (A) 805F – H; *Oskil Properties (Pty) Ltd v*

> where the end result is a foregone conclusion, and it would be a waste of time to remit the decision to the original decision-maker; where further delay would cause unjustifiable prejudice to the applicant; and where the original decision-maker has exhibited bias or incompetence to such a degree that it would be unfair to ask the applicant to submit to its jurisdiction again.

Recently, the court in this respect has held that exceptional circumstances will be shown to exist when 'a court is persuaded that a decision to exercise the power in question should not be left to the designated functionary'.[299] While the abovementioned factors may be considered, this must be in light of the constitutional requirements to ensure that administrative action is lawful, reasonable and procedurally fair, and the court will not refer a decision back where it would be procedurally unfair to do so.[300]

Where an administrator has failed to take a decision within a certain time period, or there is an unreasonable delay in taking the decision, the PAJA also provides for certain remedies.[301] The court may order the administrator to take the decision, declare the rights of the parties in that respect, provide an order relating to the granting of an interdict, and make any costs order, provided that it would be just and equitable to do so.[302]

In terms of the common law, the courts are entitled to set aside a decision or correct it, upon review proceedings.[303] Alternatively, an interdict or declaratory order may be necessary and the courts are permitted to make this award in the appropriate circumstances.[304] It is clear that the list of remedies as afforded by the PAJA goes beyond that which was allowed by the common law.

Chairman of the Rent Control Board 1985 (2) SA 234 (SE) 247E and *Theron v Ring van Wellington van die NG Sendingkerk in Suid-Afrika* 1976 (2) SA 1 (A).

[299] *Makhanya NO and another v Goede Wellington Boerdery (Pty) Ltd* [2013] 1 All SA 526 (SCA) para 42 - 43.

[300] *Makhanya NO and another v Goede Wellington Boerdery (Pty) Ltd* [2013] 1 All SA 526 (SCA) para 43.

[301] S 8(2) read with s 6(2)(g) and 6(3); C Hoexter (note 29 above) 565 - 568.

[302] S 8(2)(a)-(d) read with s 6(2)(g) and 6(3).

[303] C Hoexter (note 29 above) 518 - 519.

[304] C Hoexter (note 29 above) 519.

3.3. Judicial Review on the Basis of the Principle of Legality

Where administrative action within the bounds of the PAJA does not afford a complainant any relief, they can apply to the court to review any decision based on the principle of legality.[305] The principle of legality is a component of the rule of law and it limits the exercise of public power, independent of the PAJA.[306] The rule of law is in turn entrenched and protected by the Constitution, and judicial review on the basis of the principle of legality thus has its jurisdictional source in the Constitution.[307] The rule of law requires that a legal system should be certain, predictable and applied equally.[308] These requirements go hand-in-hand with democratic principles such as freedom of expression and the right to participation, to ensure that there are constraints on the exercise of public power.[309]

3.4. Alternative Civil and Criminal Remedies

In terms of proceeding against administrators in the courts, judicial review is not the only avenue available to aggrieved parties. They can also proceed by way of the common law, utilising the Aquilian action.[310] Alternatively, criminal sanctions can provide an effective remedy in appropriate circumstances.[311] While nuisance

[305] *Democratic Alliance and others v Acting NDPP and others*[2012] 2 All SA 345 (SCA) para 37. C Hoexter (note 29 above) 356.

[306] *Affordable Medicines Trust* (note 186 above) para 49; *Fedsure Life Assurance* (note 186 above) para 56; C Hoexter (note 29 above) 356.

[307] S 1(c) of the Constitution, *Democratic Alliance and others v Acting NDPP and others* [2012] 2 All SA 345 (SCA) para 31 and 35.

[308] *Pharmaceutical Manufacturers* (note 186 above) para 39; *Democratic Alliance and others v Acting NDPP and others*[2012] 2 All SA 345 (SCA) para 29.

[309] *Pharmaceutical Manufacturers* (note 186 above) para 39; *Democratic Alliance and others v Acting NDPP and others*[2012] 2 All SA 345 (SCA) para 29.

[310] This remedy was available under Roman law in the context of water. See Gordanius, Emperor, to Mucianus (Nov., A. D. 239.) C. 3. 35. 2. as discussed in E F Ware *Roman Water Law* (1905) §317 – 318; R Summers 'Common-law remedies for environmental protection' in A Paterson and L Kotzé (eds) *Environmental Compliance and Enforcement in South Africa* (2009) 341 – 342.

[311] See in particular M Kidd 'Criminal measures' in A Paterson and L Kotzé (eds) *Environmental Compliance and Enforcement in South Africa* (2009) 240 – 265.

is one of the common law remedies that may be of assistance, this remedy is applicable between private parties and will therefore not be discussed.[312]

While a criminal complaint can be lodged, the discretion to prosecute an environmental crime rests with the relevant Directorate of Public Prosecutions. As stated by Craigie et al, environmental crimes are insufficiently monitored on this front, both in terms of investigation and prosecution.[313]

The nature of the remedies that can be obtained through the use of civil sanctions vary. For example, the court may award either an interim or final interdict, although an interdict is described as an 'extraordinary remedy'. Should a court award an interdict, it will either cause the state to refrain from doing something (that is, be prohibitory in nature) or it will compel the state to take a certain course of action (that is, be mandatory in nature).[314] Where the remedy sought is compensation, it is more appropriate to sue the administrator in delict if the elements thereof can be satisfied.[315] While compensation may be sought under exceptional circumstances under the PAJA, or more generally in terms of the Constitution, which allows the court to award appropriate relief, this avenue is the more acceptable course of action.[316] In this respect, the courts will necessarily have to evaluate the substance of the decision-making process and will therefore entertain an indirect review of the administrator's decision.[317]

In order for a litigant to be successful in a delictual action, they must show that the administrator committed an act (or omission) which caused loss, and was further both negligent and wrongful.[318] Administrators can therefore generally

[312] R Summers (note 310 above) 344 – 345.

[313] F Craigie, P Snijman and M Fourie 'Dissecting Environmental Compliance and Enforcement' in A Paterson and L Kotze (eds) *Environmental Compliance and Enforcement in South Africa* (2009) 98. The NPA has been tasked with developing a specialized environmental investigation unit (101).

[314] R Summers (note 310 above) 346.

[315] C Hoexter (note 29 above) 521; R Summers (note 310 above) 357 – 365.

[316] S 8(1)(c)(ii)(bb) PAJA, s 38 of the Constitution, C Hoexter (note 29 above) 568.

[317] C Hoexter (note 29 above) 520.

[318] D Visser 'Compensation for pecuniary loss – the *actio legis Aquiliae*'in F du Bois (ed) *Wille's Principles of South African Law* (2007) 1096 – 1133.

escape liability if they can show that they were acting within the purview of the legislative framework.[319] The courts have been reluctant to award damages where an administrator acted in the public interest, provided this decision was made in good faith.[320] The enquiry will be context-specific and the courts will evaluate policy decisions and the public interest.

4. Concluding Remarks

The purpose of this chapter was to set out the nature of the oversight mechanisms, as well as the remedies available to dissatisfied parties where the state is failing to fulfill its trusteeship duties. In terms of the checks and balances on the state, the public has a right to public participation,[321] which is expressly required in terms of the National Water Act in certain circumstances. In addition, the public has the right of access to information, and can request information from both the state and private parties, subject to certain criteria.[322]

The Constitution created four Chapter 9 institutions, which all aim to oversee and regulate the functioning of the state. These are the Public Protector,[323] the South African Human Rights Commission,[324] the Commission for Gender Equality[325] and the Auditor-General.[326] However, as was observed in this chapter, none of

[319] See for example the discussion in C Hoexter (note 29 above) 467 stating that administrators are still required to 'avoid or lessen the harm that may be caused by the exercise of those public powers'. See also in this respect *Minister of Water Affairs and Forestry and others v Durr and others* [2007] 1 All SA 337 (SCA) para 23 and *Local Transitional Council of Delmas v Boshoff* 2005 (5) SA 514 (SCA) para 26.

[320] C Hoexter (note 29 above) 522 - 523.

[321] See note 39 above.

[322] See note 29 above.

[323] See note 141 above.

[324] See note 153 above.

[325] See note 155 above.

[326] See note 146 above.

these institutions appear to be putting the state under pressure to ensure that water resources are properly managed in accordance with the duties of trusteeship.[327]

The Water Tribunal is required to function as a court of first instance in terms of the National Water Act, in instances where water rights have been infringed.[328] However, this remedy is currently unavailable, as the Water Tribunal has been disbanded until an interim Tribunal can be created.[329]

The right to just administrative action can also provide a remedy in the context of trusteeship as any decision which is either unlawful, unreasonable or procedurally unfair can be challenged and set aside.[330] Even where one of these requirements is not satisfied within the scope of the PAJA, provided that it can be shown that the decision violates the principle of legality, a decision can be set aside.[331] In the event that it is found that a decision amounts to administrative action, there are a number of remedies available to the courts to remedy the situation.[332]

While a number of oversight mechanisms and remedies therefore exist within the context of water management, it is clear that these do not necessarily serve to ensure that the state fulfils its role as trustee. This is particularly in light of the current problems with water resources, such as pollution and a lack of access to adequate sanitation services, owing to poor management by the state. This area requires further attention to ensure that the duties of trusteeship are properly fulfilled. The following chapter aims to address the shortcomings of the legislative scheme as well as propose suggestions in this regard.

[327] See note 138 ff above.

[328] See note 157 above.

[329] See discussion at Ch 8 below (note 210).

[330] See note 166 above.

[331] See note 305 above.

[332] See note 289 above.

Chapter Eight:

ANALYSIS OF TRUSTEESHIP IN WATER LAW

1. Introduction

It is the suggestion of this thesis that the legislative introduction of the concept of trusteeship imposes no more duties on the state than their ordinary constitutional responsibilities, although it does provide the content of these duties.[1] State trusteeship in the context of the National Water Act and the Water Services Act is, therefore, state trusteeship in the narrow sense. However, from the perspective of the Constitution, which imparts the duties of trusteeship not only onto the state, but also the courts and society, trusteeship is viewed more widely. As mentioned, the concern of this thesis is with the content of the narrower meaning.

The use of the terminology 'trustee' and 'custodian' is found in numerous other legislative sources in South Africa, evidencing the legislature's intent to impart administrative responsibilities onto the state.[2] While the Act certainly gives content to these constitutional duties, the responsibility of the state to ensure that

[1] See discussion at Ch 3 (note 17 above).

[2] The terminology 'trustee' and 'custodian' is also used in the following legislation: s 3 of the Mineral and Petroleum Resources Development Act 28 of 2002 makes the State the custodian of all mineral resources on behalf of all South Africans specifically; s 3 of the Electricity Regulation Act 4 of 2006 provides that the National Energy regulator is the custodian of the regulatory framework; s 3 of the National Environmental Management: Biodiversity Act 10 of 2004 holds that the state is the trustee of biological diversity, acting through its organs, and must 'manage, conserve and sustain South Africa's biodiversity'; s 3 of the National Environmental Management: Protected Areas Act 57 of 2003 makes the state the trustee of all protected areas in South Africa; s 12 of the National Environmental Management: Integrated Coastal Management Act 24 of 2008 provides that all coastal property must be 'used, managed, protected, conserved and enhanced' by the state in its role as trustee; Interestingly, the Integrated Coastal Management Act specifically provides that all coastal public property is owned by South African citizens, clearly evidencing the possibility of public property to be owned by citizens. See also E van der Schyff 'Stewardship doctrines of public trust: Has the eagle of public trust landed on South African soil? (2013) 130 *South African Law Journal* 369 370.

the goals of sustainability, equity and efficiency are promoted exists independently of the statutory trusteeship provisions.[3] What these provisions did, was to make the state the administrator of water as a resource.[4] Whether the word 'administrator' or 'trustee' is used makes little difference to the responsibilities of the state. In other words, the responsibilities of the state as trustee (in the narrow sense) go beyond that of the statutory framework and, in particular, section 3 of the Water Act. Given that the state was the administrator of water and its use prior to the introduction of the constitutional legal framework, what has changed is not the role of the state, but rather the values that guide its conduct. State trusteeship in the narrow sense then is mere rhetoric: the use of the word 'trustee' evidences an appreciation of the value of water to society, both as a social and economic good. State trusteeship certainly invokes images of protection and care in a way that the word 'administrator' does not. However, given the problems identified with water management in the preceding chapters, it is clear that the use of the term 'trusteeship' has not promoted good governance, accountability, or the proper management of water by the state.[5]

The purpose of this chapter is to evaluate the strengths and weaknesses of trusteeship within the context of the legal framework. Whilst there is much written about the shortcomings of the legal framework governing water, the approach of this thesis is to view these shortcomings from the perspective of trusteeship. This chapter will reiterate that the understanding of the duties of trusteeship is not furthered either by the notion of *res publicae*, or with reference to the public trust doctrine. Secondly, it will analyse the approach to water management with a view to identifying the shortcomings of the legal framework, the values of trusteeship, as well as the mechanisms and remedies available in this regard.

[3] See Ch 3 note 55 above.

[4] See Ch 4 note 123 above.

[5] See Ch 5 above generally.

2. Analysis of the Existing Attempts to Explain Trusteeship

The relevance of Roman and Roman-Dutch law was discussed in Chapter 4, as was the relevance of the public trust doctrine. Part of the novel contribution of this thesis is to show how the requirements of trusteeship contained in the South African legal framework go beyond those required by the historical classifications and the public trust doctrine. This is discussed below.

Water was capable of private ownership in both Roman and Roman-Dutch law. This has clearly not been the nature of legal developments in South Africa, where the legislature elected to classify all water as public, and part of the same hydrological cycle subject to the same legal framework.[6] All water is public therefore, and if one were to classify it in terms of the historical sources, it would be capable of classification as either *res publicae* or *res communes.*[7] While *res publicae* would afford the state administrative control over the resource, the texts do not discuss to what extent the state is capable of administering *res communes.*[8] Given the nature of the examples listed as types of *res communes* (that is the air, light and sea), it is possible that the old authors never contemplated the state needing to administer these resources.

Unfortunately, the Supreme Court of Appeal has erroneously found that 'public water, running in a river or a stream, was recognised as being *res communes* and therefore incapable of being owned'.[9] The effect of this judgment is that water, which should be classified as *res publicae*, that is water running in rivers and streams, must now be classified as *res communes.* Previously, all other water would either have been classified as *res communes* (that is, running water) or

[6] See Ch 3 note 268 above.

[7] See Ch 4 note 93 ff above.

[8] E van der Schyff 'The concept of public trusteeship as embedded in the National Water Act, 1998' (2011) *Water Research Commission* 24.

[9] *Mostert Snr and another v S* [2010] 2 All SA 482 (SCA) para 22. See Ch 4 note 118 above.

private.[10] Private water should now be classified as public in terms of the legislation, contrary to the historical sources, and consequently should either be treated as *res publicae* or *res communes.* Given that all water is now part of the same hydrological cycle, it would be an anomaly to classify it differently to other water within the hydrological cycle, which is already classified as *res communes*, as asserted by this thesis. Therefore, the argument can be made that all water within the hydrological cycle is classified as *res communes.* The practical implication of this judgment is that water is incapable of ownership and therefore incapable of being stolen.[11] In all other respects, the constitutional and statutory framework regulates water resources, thereby allowing the state to administer water resources, despite this classification.[12]

In the context of *res publicae*, these historical classifications aimed to ensure access to these resources and the use thereof.[13] Furthermore, the rules pertaining to their management by the state centred on regulating the navigability of rivers and regulating the relationships between users of water.[14] The nature of the examples listed to explain *res communes* (that is light, air and the sea)[15] create the impression that regulating the use and access of these resources were not in issue. Given their abundance and inability to be controlled, the silence of the sources as to the role of the state in relation to these resources further reinforce this impression that control and regulation was not contemplated.

However, it is clear that that both the use and access to water resources is highly controlled under the new water management regime.[16] In addition, the goals of this management are to ensure both equitable access to the resource as well as the

[10] See Ch 4 note 10 above.

[11] See Ch 4 note 160 above. However, see above at Chap 4 (note 124) where the possibility of "bare" or "nude" dominium is discussed.

[12] See discussion at Ch 3 above.

[13] See Ch 4 note 46 above.

[14] See Ch 4 note 55 above.

[15] See Ch 4 note 10 above.

[16] See Ch 3 note 221 above.

sustainable use thereof.[17] To understand trusteeship, therefore, reliance must be placed on the content of the Constitution and the statutory framework, rather than these historical sources.

In the context of ensuring equitable access to resources, Roman and Roman-Dutch law developed during a vastly different socio-political era, one which was not concerned with ensuring equity.[18] Public property notions did not vest in the Roman public any rights of public participation in the political process, as is required today.[19] Further, the expression of the principles of public property may have been normative[20] – a statement of 'what the Emperor might have wished the law to be'… thereby elevating this 'to the level of undeserved authority'.[21] In addition, it is unclear whether Roman law, despite it affording the public with a guaranteed right of use of and access to the resource, actually vested in the public any sort of enforceable right.[22] As Sax states, 'no evidence is available that public rights could be legally asserted against a recalcitrant government'.[23]

By comparison, an analysis of the public trust doctrine is useful, to the extent that it shows how the South African legal framework has better provided for the goals of water management.

[17] See Ch 2 note 198 above.

[18] G R Scott 'The expanding public trust doctrine: a warning to environmentalists and policy makers' (1998-1999) 10 *Fordham Environmental Law Journal* 30; D Johnston *Roman Law in Context* (1999) 28.See also P Garnsey *Social Status and Legal Privilege in the Roman Empire* (1970) 221 who describes the various distinctions betwee higher and lower status in the Roman population, as well as G Mousourakis *A Legal History of Rome* (2007) 3 – 18.

[19] P Deveney 'Title, jus publicum and the public trust: an historical analysis' (1976) 1 *Sea Grant Law Journal* 35-36.

[20] T P Brady ''But most of it belongs to those yet to be born:' the public trust doctrine, NEPA, and the stewardship ethic' (1989-1990) 17 *B.C. Envtl. Aff. L. Rev.*625.

[21] G R Scott (note 18 above) 25. See also on the development of Roman law, and its limited use later on, J Harries 'Roman Law Codes and the Roman Legal Tradition' in J W Cairns and P du Plessis (eds) *Beyond Dogmatics: Law and Society in the Roman World* (2007) 85 – 104.

[22] J Searle 'Private property rights yield to the environmental crisis: perspectives on the public trust doctrine' (1989-1990) 41 *South Carolina Law Review* 899; P Deveney (note 19 above) 17.

[23] J L Sax 'The public trust doctrine in natural resource law: effective judicial intervention' (1970) 68 *Michigan Law Review* 475.

The public trust doctrine is inherently flexible, as each state is entitled to provide its own content in terms of the equal footing doctrine.[24] The South African legal framework necessitates the implementation of Adaptive Management, which requires decision-makers to adopt a flexible approach, which can accommodate environmental changes as and when they occur, depending on the environmental and social needs at the time.[25] However, this approach is resource-intensive and necessarily undermines legal certainty. A criticism of this approach in the American context is that it is not certain that the underlying goal of the doctrine is environmental protection.[26] While the American doctrine may in time shift away from environmental protection, it is clear that sustainability and consequently the protection and preservation of water resources in South Africa are fundamental goals from which deviation is not permissible.[27]

South Africa has adopted a management system with a universal legal framework. Similar to the equal footing doctrine in America, each catchment management area must develop its own Strategy for the management of water in its region, provided that this is consistent with the goals of the national Strategy.[28] In this respect, the South African approach is more favourable than the American approach in two ways: the management of water is demarcated along the natural water boundaries resulting in a more organic method of regulating water use whilst the public trust doctrine in America is regulated in terms of political boundaries;[29] secondly, water is required to be managed consistently with the goals of the national Strategy, resulting in a coherent effort to address the goals of water management. By comparison, each state in America has developed the scope and meaning of the doctrine in vastly different ways.[30]

[24] See Ch 4 note 233 above.

[25] See Ch 6 note 19 above.

[26] See Ch 4 note 232 above.

[27] See Ch 5 note 4 above.

[28] See Ch 3 note 413 above.

[29] See Ch 4 note 226 above.

[30] See Ch 4 note 233 above.

Between the states, there is no consistency as to which resources are protected.[31] However, in South Africa it is clear that *all* water resources are protected: all water is public and part of the same hydrological cycle.[32] There is no distinction made between ground and surface water, or whether the water is used for fishing or recreation. This again results in a consistent approach to the management of water resources.[33]

Another area of uncertainty is whether the doctrine has its source in federal or statutory law.[34] However, in South Africa, the constitutional right to a healthy environment and access to water resources at the very least creates an implied constitutional doctrine of trusteeship, as it is the state that must give effect to these rights.[35] Further, trusteeship is an expressly created statutory creature.[36] As a result, there is no uncertainty as to the source of its authority: trusteeship is anchored in both the Constitution and statutory law. The relevance of looking to the Roman and Roman-Dutch classifications is to establish whether trusteeship could also be anchored in the common law. However, there is a clear constitutional and statutory basis for its implementation. The courts are permitted, and required, to investigate the conduct of the state where they breach their duties as trustee. The content of these duties is derived from the Constitution and legislation, as well as the Strategy.[37] The difficulties experienced in American law as to whether the judiciary is competent to investigate state conduct and the extent to which this is permissible is therefore not experienced in South Africa.

The American doctrine has also given rise to problems of classification within the legal system, with authors positing that it could be classified as administrative law, constitutional law or property law, or a combination of these areas.[38] In South

[31] See Ch 4 note 257 above.

[32] See Ch 3 note 268 above.

[33] See Ch 5 note 42 above.

[34] See Ch 4 note 237 above.

[35] See Ch 3 note 257 above.

[36] See Ch 3 note 180 above.

[37] See, generally, Ch 5 above.

[38] See Ch 4 note 242 above.

Africa, the duties of management of water are vested primarily in the state as trustee, and these duties concern the protection, use, development, conservation, management and control of water – duties that are primarily administrative.[39] Given that the source of trusteeship in South Africa is the Constitution, trusteeship can also be classified as constitutional in nature. As was argued in Chapter 4, the classification of water as either *res publicae* or *res communes* provides no real assistance to furthering the duties of trusteeship.[40] Consequently, while water resources do constitute public property, these classifications provide no further guidance than understanding the nature of the property. The content of trusteeship, however, is informed by the Constitution, legislation and the Strategy, which give effect to the state's duties to *administer* the resource. Consequently, it is better described as an administrative and constitutional law doctrine in South African law.

Both the public trust doctrine and trusteeship require management of resources consistent with the public interest.[41] While there is no clarity as to what the nature of the public interest is in terms of the doctrine, the public purpose for which water uses may be allocated in South Africa are clearly contained within the Constitution, the National Water Act and the Water Services Act.[42] Consequently, identifying a public purpose will start with these sources of law. This does not necessarily mean that it is easy to identify whether a public purpose is legitimate. Where courts are required to intervene, they will still have to balance the various interests, including the social, economic and environmental interests, in order to evaluate whether a decision is legitimate.[43] However, it is clear that in the context of the constitutional right of access to water, the state is bestowed with a positive obligation to fulfill this right, subject to the limitations set out in the Constitution, as assessed against a standard of reasonableness.[44] Similarly, in the context of the

[39] See Ch 3 note 185 above.

[40] See Ch 4 note 156 ff above.

[41] See Ch 4 note 269 and Ch 5 note 235 above.

[42] See Ch 5 note 235 above.

[43] See Ch 3 note 58 above.

[44] See Ch 3 note 69 above.

right to a healthy environment, the state must show that it has actively engaged with this provision and genuinely attempted to further the goals of sustainability.[45]

The doctrine also contains an inherent tension, namely, an attempt to ensure the protection of resources almost always entails regulating, or more particularly, trying to prevent access to the resource.[46] In South Africa, access to water resources and the ecological protection and preservation of environmental resources create two independent rights in the Constitution. These rights are by their very nature in conflict, and the state is required to balance the needs of these competing rights within the parameters of the requirements of sustainability.[47] As stated in Chapter 3, the environment cannot be preserved at all costs, particularly not where legitimate social and economic goals outweigh the preservation of the environment.[48] However, this must be balanced against the need to ensure that the environment is capable of sustaining life not only for the present generation, but also future generations.[49]

The fulfillment of democratic principles, such as public participation, the provision of access to information and the separation of powers, is crucial to ensuring that trusteeship is properly implemented by the state.[50] In the context of the doctrine, Sax has shown that the government in America employs two mechanisms to avoid complying with the requirement of public participation: it either intentionally reduces the level of public participation by making 'low-visibility' decisions; or it waits until development is too far gone for a change in the outcome to be justifiable.[51] Both of these problems are experienced in South Africa, where the state actively attempts to evade its responsibilities of ensuring access to information and public participation in the decision-making process.[52]

[45] See Ch 3 note 43 above.

[46] See Ch 4 note 289 above.

[47] See Ch 5 note 7 above.

[48] See Ch 5 note 38 above.

[49] See Ch 5 note 137 above.

[50] See Ch 7 note 28 ff above.

[51] See Ch 4 note 297 above.

[52] See Ch 7 note 48 and 63 above.

However, the problem with public participation is not that there are insufficient legal mechanisms in place to ensure that it is given effect to, but rather, a failure to properly ensure its implementation.

The separation of powers aims to dilute the concentration of power into three separate divisions, such that each branch is able to maintain an oversight function over the other two branches.[53] The judiciary plays a particularly important role in this regard, as private citizens are able to challenge state actions where this conduct may have gone beyond the powers conferred on them.[54] The issue of the counter-majoritarian dilemma cannot be avoided whenever the courts are called upon to question state conduct. This is even more so when the decision-making process is multi-faceted and very technical, such as the nature of the decision-making process in the context of water resources. However, this must be balanced against the need for legitimate judicial interference in the context of socio-economic adjudication, where administrators fail to fulfill their constitutional mandate.[55] Liebenberg argues that the technical nature of a case should not preclude the judiciary from hearing matters dealing with socio-economic rights, nor however, should they be permitted to shirk their responsibilities in this regard.[56]

3. Analysis of the Current Approach to Water Management

The potential solutions to the problems encountered in water management are not new, nor are they easy to implement. Most of the problems are both widespread and difficult to fix. The state has set itself the following primary targets in order to

[53] See Ch 4 note 306 above.

[54] See Ch 7 note 166 above.

[55] M Pieterse 'Coming to terms with the judicial enforcement of socio-economic rights' (2004) 20 *South African Journal of Human Rights* 383; C Hoexter *Administrative Law in South Africa* 2ed (2013) 150. See, for example, *Mazibuko and Others v City of Johannesburg* 2010 (3) BCLR 239 (CC) [hereafter '*Mazibuko* (CC)'], which highlights the importance of litigating socio-economic rights at para 160. S Liebenberg *Socio-economic Rights: Adjudication Under a Transformative Constitution* (2010) 479.

[56] S Liebenberg (note 55 above) 71 – 75.

improve water management, namely: 'Achieving equity, including Water Allocation Reform; Water conservation and water demand management; Institutional establishment and governance; Compliance monitoring and enforcement; and Planning, infrastructure development and operation, and maintenance of water resources infrastructure'.[57] The state is thus alive to many of the problems of water management, and is actively addressing these problems. However, the extent of these problems combined with a budget deficit, skills shortage and high levels of maladministration, means that the state may never be able to do so.

The proposed solutions below have all been stated before, by various authors and in various configurations. There is no magic solution to fixing the problems of water mismanagement. However, simplifying the processes, clarifying inconsistencies and increasing the efficiency of water use may go a long way to solving these problems.

The purpose of this section is to discuss the advantages and disadvantages of the current approach to water management. This will be addressed with a particular focus on the role of the court in relation to trusteeship, the state's failure to adequately administer water resources in accordance with the legal framework, as well as the shortcomings of the framework itself. In addition, the inadequacies of the available oversight mechanisms and remedies will be discussed.

3.1. The Role of the Courts

It is the assertion of this thesis that the use of the terminology 'trusteeship' in and of itself did not change the role of the state as the administrator of water resources, as confirmed by the Supreme Court of Appeal in *Mostert Snr and another v S*.[58] To the extent that the state does not comply with the constitutional and statutory duties established to fulfil this administrative role, the courts are

[57] Strategy (2013) 102

[58] [2010] 2 All SA 482 (SCA).

empowered to review state conduct and ensure compliance.[59] The Constitutional Court has gone so far as to state that it is the duty of the court to ensure that the responsibility of the protection of the environment (which it terms 'trusteeship') is fulfilled.[60]

However, an absurdity has arisen in this context: while the court has elected itself the trustee or guardian in respect of the protection of the environment (that is, matters related to section 24 of the Constitution), the same court has refrained from involving itself in the context of ensuring that the right of access to water is fulfilled. The court in *Mazibuko v City of Johannesburg*[61] specifically stated that 'it is institutionally inappropriate for a court to determine what the achievement of any particular social and economic right entails and what steps government should take to ensure the progressive realisation of the right'.[62]

The state is not complying with its duties of trusteeship: there is an endemic and apparent failure on the part of the state to ensure that water is both protected and preserved, and that access to sufficient water is made available in order to give effect to the right to dignity.[63] While the courts have adopted an active role in respect of the former,[64] a more active role on the part of the judiciary in terms of the right of access to water is required, in line with the approach of the Supreme Court of Appeal in *City of Johannesburg and others v Mazibuko and others*.[65]

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[59] See Ch 3 note 52 above. E van der Schyff (note 2 above) 382; E van der Schyff cites two instances where the court has intervened where the state has failed to comply with its duties of trusteeship. See *Meepo v Kotze* 2008 (1) SA 104 (NC) and *Bengwenyama Minerals Pty Ltd v Genorah Resoucres* 2011 (4) SA 113 (CC).

[60] *Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others* 2007 (10) BCLR 1059 (CC) para 102; *MEC: Department of Agriculture, Conservation and Environment and another HTF Developers (Pty) Limited* 2008 (4) BCLR 417 (CC) para 28.

[61] 2010 (4) SA 1 (CC).

[62] Mazibuko (CC) para 61. See also S Liebenberg (note 55 above) 469.

[63] See generally Ch 5 above.

[64] See Ch 3 note 52 above.

[65] [2009] 3 All SA 202 (SCA). The court's approach in *Federation for Sustainable Environment and Another v Minister of Water Affairs and Others* (35672/12) [2012] ZAGPPHC 140 (26 July 2012) is also praiseworthy. See also Ch 5 note 191 above.

Given the importance that dignity plays in the constitutional dispensation, especially when viewed against the historical background of water management, the courts should not shy away from challenging the state in order to ensure it satisfies its mandate. Liebenberg criticises the current approach to the positive and negative duties of the state as set out by the Constitutional Court. She argues that the model of review used to evaluate state conduct in the context of their positive duties results in 'less robust forms of accountability'. This fails to acknowledge the role of the state in the distribution of resources. More importantly, it fails to acknowledge that a lack of access to resources exacerbates and entrenches poverty.[66]

3.2. The Current Legal Framework

Despite the fact that the current legal framework already represents a more simplified approach to water management,[67] it is necessary to streamline it further in order to increase efficiency. The perfect opportunity for this streamlining has now arisen, as the National Water Act and Water Services Act are to be consolidated in accordance with the National Water Policy Review (hereinafter the 'Water Policy').[68] The focus of the consolidated legislation will be developmental water management, management of the entire 'water value chain', and to establish a National Water Strategy which incorporates water services and sanitation.[69]

[66] S Liebenberg (note 55 above) 218; T Humby and M Grandbois 'Human right to water in South Africa and the *Mazibuko* decisions' (2010) 51 *Les Cahiers de Droit* 537.

[67] See Ch 2 note 225 above.

[68] GN 888 of 30 August 2013: National Water Policy Review: updated policy positions to overcome the water challenges of our developmental state to provide for improved access to water, equity and sustainability at p 5. However, it has been argued that that the unification of this legislation is unlikely to target the real problem of water management in the country, 'namely departmental and municipal incompetence'. See Editorial 'New water law won't help much' *Business Day Live* 5 September 2013. Water Research Commission 'Water and society: Upscaling community-based partnerships in South Africa' (2014) *Technical Brief* 1.

[69] See Ch 3 note 427 above; National Water Policy Review 5 – 8.

However, it has been pointed out that the unification of this legislation is unlikely to target the real problem of water management in the country, 'namely departmental and municipal incompetence'.[70]

The National Water Act provides that all water is public, and management of this resource should be allocated to the lowest appropriate level, in order to further the principles of public participation. Brown notes that while the National Water Act ostensibly promotes the decentralisation of power, it has in fact removed water management powers from local government and instead given them to the national government as trustee, thereby consolidating and centralising power.[71] While the long-term goal is for these powers to be devolved to catchment management agencies, no time-frame is established for this process to be completed. Consequently, a failure on the part of the Minister to transfer these powers will not result in a transgression of the legislation.[72] Thus far, the Minister has been inclined to resist the devolution of the powers and duties that are more appropriately suited to catchment management agencies.[73]

While the devolution of power is aimed at the upliftment of communities and allowing them greater participation in the context of the management of natural resources, Francis is critical of this decentralisation of power, particularly given South Africa's history and socio-economic environment.[74] In the first place, catchment management agencies are legislatively required to fund themselves, creating huge difficulties where these funds are not easy to generate.[75] Secondly, the devolution of power requires participation of community members who are

[70] Editorial 'New water law won't help much' (note 68 above); Water Research Commission 'Water and society: Upscaling community-based partnerships in South Africa'(note 68 above).

[71] J Brown 'Assuming too much? Participatory water resource governance in South Africa' (2011) 177 *The Geographic Journal* 180.

[72] J Brown (note 71 above) 180.

[73] See Ch 3 (note 277 above).

[74] R Francis 'Water justice in South Africa: natural resources policy at the intersection of human rights, economics and political power' (2005-2006) 18 *Georgetown International Environmental Law Review* 20 - 22.

[75] R Francis (note 74 above) 20 - 22.

not homogenous, resulting in power imbalances.[76] Not only are there institutional difficulties, such as a lack of skills and capacity, but in addition, there also still exist large gender and racial inequalities.[77] Consequently, Francis states: [78]

> Whatever the intentions behind decentralized management, it may not amount to much more than an artful legislative copout by the national government, because so many communities have neither the capacity to manage water democratically nor the finances to supply it affordably.

Similarly, in the context of the provision of water and sanitation services, the lowest appropriate level for the decentralisation of powers is the municipality. However, as pointed out by Muller, many of these municipalities lack the skills and expertise to function without assistance and support from regional or national bodies.[79] Consequently, as with the criticism of decentralisation of power to catchment management agencies, the intention to dilute the powers to a lower level may in this instance also be misguided.

However, the delineation of powers to catchment management agencies is also a positive feature of the current legal framework.[80] It allows decision-makers to regulate water resources relative to local conditions and needs, within the greater scheme of the goals set out by the national Strategy.[81] The failure to establish these agencies more quickly, and to delegate and assign powers is a flaw of the current system and must be urgently addressed so that these institutions and their capacities can be developed.[82] In addition, clarification of the impact of assignment of powers by the Minister to catchment management agencies and

[76] See Ch 7 (note 57 above).

[77] C A Sullivan J R Meigh, A M Giacomello et al 'The Water Poverty Index: Development and application at the community scale' (2003) 27 *Natural Resources Forum* 191; R Francis (note 74 above) 20 - 22.

[78] R Francis (note 74 above) 22.

[79] M Muller 'Free basic water – a sustainable instrument for a sustainable future' (2008) 20 *Environment and Urbanization* 82. As at 2008 when this article was published, approximately 130 out of 284 municipalities required institutional support.

[80] See Ch 3 (note 268 above).

[81] See Ch 3 (note 199 above).

[82] See Ch 3 (note 278 above).

other parties is required.[83] Finally, the creation of catchment management agencies, given that they are required to fund themselves, must carefully ensure that 'existing differences in economic and social power are reduced and not strengthened'.[84]

It is uncertain how the new legislation will address the fact that the delineation of the various water management functions do not coincide: water is managed within the boundaries of a catchment management area, and water and sanitation services are managed according to municipal boundaries. The problem with overlapping jurisdictions is that it increases the complexities of decision-making by increasing the number of persons involved in one particular task.

One of the primary criticisms of the entire legal framework regulating the environment is that it is fragmented and fails to take a holistic approach to the regulation of the environment.[85] Of greatest concern is that water and mineral resources fall outside the purview of the compliance and enforcement provisions created by the National Environmental Management Act 107 of 1998 (hereinafter the 'NEMA'). Whilst land and air pollution, biodiversity, protected areas and integrated coastal management are all regulated within the array of legislation dealt with by the NEMA, water and mineral resources fall to be dealt with in terms of their own legal regimes and departments.[86] One of the mechanisms introduced to ensure compliance with environmental obligations is the Environmental Management Inspectorate (the 'Inspectorate').[87] However, these inspectors have no jurisdiction to evaluate and enforce compliance in the context

[83] See Ch 3 (note 192 above).

[84] National Water Policy Review 16.

[85] L Kotzé refers to institutitonal, legislative and inter-sectoral fragmentation, as well as fragmentation of the compliance and enforcement regime. Of greatest concern, for the purposes of this thesis, is the fragmentation of the compliance and enforcement regime, which appears to be the biggest shortfall of the management of water resources. See L J Kotzé 'Environmental governance' in A Paterson and L Kotzé (eds) *Environmental Compliance and Enforcement in South Africa* (2009) 110 – 114.

[86] L J Kotzé (note 85 above) 112.

[87] F Craigie, P Snijman and M Fourie 'Dissecting Environmental Compliance and Enforcement' in A Paterson and L Kotze (eds) *Environmental Compliance and Enforcement in South Africa* (2009) 88 – 96.

of water and mineral resources.[88] Given that these inspectors form part of a dedicated, trained unit specialising in compliance and enforcement, the omission of water and mineral resources from their portfolio is a serious shortcoming of the current legal framework.[89]

Whilst the Water Policy aims to bring the legislation governing water in line with the NEMA in terms of the available dispute resolution mechanisms, it is silent as to the mechanisms available in terms of compliance and enforcement.[90] The powers afforded to inspectors may be of huge benefit to promoting the goals of water management. Consequently, if these inspectors are not to be given the powers to regulate issues concerning water, then the Department should be given the mandate to create its own equivalent of environmental management inspectors. In addition, these inspectors should be given the same powers as those contained in the NEMA, and should furthermore be entitled to investigate all water resources, including water used in mining operations.

'Trusteeship' should be expressly defined in line with the legislature's desired purpose for the role of the state. It is argued that statutory trusteeship currently amounts to the administrative role of the state in accordance with its constitutional and statutory obligations to manage water sustainably, equitably and efficiently. All stakeholders and role players in the management of water should be clearly defined and have expressly stated powers and duties. Thompson has suggested that the current legislative scheme, which allows for different powers to be vested in different persons (that is, between a responsible authority, authorised person and/or CMA), needs to be rationalised. These powers need to be vested in individuals such that compliance with the legal requirements can be ensured. This also entails improving the competencies of such persons so that they have the requisite skills to perform their functions, as well as ensuring that these persons

[88] L J Kotzé (note 85 above) 113.

[89] L J Kotzé (note 85 above) 113.

[90] National Water Policy Review 21.

are tasked solely with the job of ensuring compliance, rather than diluting their functions with other responsibilities.[91]

According to the Water Policy, the new legislation must cater for equitable use of water resources not just for domestic purposes, but also economic purposes.[92] However, there is to be no increase in the minimum amount of free water provided to indigent households, which remains at 25 litres per person per day.[93] Finally, the new legislation must recognise the link between poverty and access to water resources, and consequently ensure that the 'water needs of poor rural communities are met and protected to support the development of sustainable livelihoods'.[94]

It is clear, therefore, that giving effect to equity and sustainability will feature strongly in the new legislation. The primary policies established by the Water Policy do not yet include customary law entitlements, although this may become a recommended key policy after further investigation.[95] Another key policy that may be added is free basic sanitation.[96] The Water Services Act currently provides that '[e]veryone has a right of access to basic water supply and basic sanitation'.[97] Implementation of a free basic sanitation policy would thus take this right one step further. It is argued that this approach would serve to give effect to the right to dignity. Increasing the minimum quantity of free water in particularly vulnerable areas would also go a long way to promoting the principles of human dignity and equality.

[91] H Thompson *Water Law: A Practical Approach to Resource Management and the Provision of Services* (2006) 257; F Craigie, P Snijman and M Fourie (note 87 above) 84.

[92] National Water Policy Review 9.

[93] See Ch 5 note 189 above.

[94] National Water Policy Review 9.

[95] National Water Policy Review 24.

[96] National Water Policy Review 24.

[97] S 3.

3.3. The Values of Trusteeship

The values of trusteeship were discussed in Chapter 5 in terms of sustainability, equity and efficiency. Whilst sustainability and equity are normative, the value of efficiency aims to assist in achieving the goals of sustainability and equity.[98] What lies at the heart of the problems inherent to the water management system is inefficiency, caused predominantly by a lack of technical skills, institutional skills, financial management and cooperative governance.[99] The Water Policy captures this sentiment by stating:

> The present generalised lack of technical and managerial expertise means, however, that a mechanical decentralisation or delegation of functions is unlikely to achieve the objectives of more responsive and effective water management. The goals of public policy will only be achieved if such delegation goes hand in hand with systematic capacity building and effective monitoring and support from the national Department.[100]

The current licensing system is one of the inefficient aspects of water management. At present, the state is not meeting its responsibilities to review existing licenses every 5 years, largely due to capacity constraints.[101] Nor is it able to monitor compliance with authorisations, which has led to the illegal use and pollution of water, including in some instances from municipal wastewater treatment works themselves.[102] Further, the process of applying for a license is a lengthy and highly complex process. In some instances, where the application should take only five months to complete, it has taken over five years to finalise.[103]

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[98] National Water Policy Review 16. See Ch 5 note 4 and 137 above.

[99] See discussion above at Ch 5 (note 241 ff); K Lehmann 'Voluntary compliance measures' in A Paterson and L Kotzé (eds) *Environmental Compliance and Enforcement in South Africa* (2009) 240

[100] National Water Policy Review 16. See discussion at Ch 5 (note 241 ff above).

[101] S Movik and F de Jong (note 68 above) 72; B Schreiner, G Pegram and C von der Heyden 'Reality check on water resources management: Are we doing the right things in the best possible way?' (2009) 11 *Development Planning Division (Working Paper Series)* 9 -10.

[102] Strategy 71.

[103] S Movik and F de Jong (note 68 above) 76; M Muller, B Hollingworth and M Ndluli 'Can we manage our water better? Prospects and processes for the establishment of stakeholder-initiated catchment management agencies' (2012) *Report to the Water Research Commission* 44; R Pejan,

Kidd points out that the trusteeship role of the state, together with its obligations in terms of the licensing system, result in an onerous 'administrative burden' on the state.[104] In addition, there are insufficient human resources to ensure that the licensing system is properly implemented. This is exacerbated by the fact that the system of licensing is not clearly defined, as it is ultimately a discretionary process.[105] As a result, persons are being compelled to apply for water use licences in instances where they are not legally required to do so, and vice versa.[106] The combination of an increased number of decision-makers in the system, together with a lack of defined rules allows greater scope for 'corruption and other maladministration' to occur.[107]

Kidd argues that one of the ways in which the Act has attempted to alleviate this administrative burden is by allowing for the continuation of pre-existing, lawful uses, which reduces the need for administrative interference. As a result, decision-makers should only have to award licenses in situations where an area is classed as water stressed, or for some other 'compelling' reason.[108] However, existing lawful uses are problematic for a number of reasons, the most important of which is the obstacle that they present for redressing inequality. The majority of the holders of these uses do not reflect the goals of equity and social transformation as required by the Constitution and the Act.[109] Historically, commercial farmers in South Africa have been almost exclusively white males. As a result, most of the existing use authorisations are in white male hands.[110] Pre-existing water uses are

D du Toit and H Thompson 'Norms for policy implementation lags in the South African water sector' (2011) *Report to the Water Research Commission* 24.

[104] M Kidd *Environmental Law* 2ed (2011) 87.

[105] V Bronstein 'Drowning in the hole of the doughnut: Regulatory overbreadth, discretionary licensing and the rule of law' (2002) 119 *South African Law Journal* 469; M Kidd (note 104 above) 87.

[106] S Movik and F de Jong (note 68 above) 72.

[107] V Bronstein (note 105 above) 469; M Kidd (note 104 above) 87.

[108] M Kidd (note 104 above) 87.

[109] S Movik and F de Jong (note 68 above) 72.

[110] S Movik and F de Jong (note 68 above) 71. For a discussion on commercial white land ownership, see D Hallowes and M Butler 'Power, poverty and marginalized environments' in D A McDonald (ed) *Environmental Justice in South Africa* (2002) 61 – 63.

also intended to provide for lawful water use in terms of African customary law. Instead, these pre-existing uses have been difficult to verify, with the result that genuine pre-existing use of water may not be being appropriately recognised.[111] Consequently, one of the biggest challenges to the goals of ensuring equitable access to water and its benefits is the system of existing lawful uses.[112]

The second problem is that existing lawful uses are not subject to conditions or review by the state, as is required in the context of licences. However, while licences facilitate control over the use of water, practically the state is failing to utilise the system properly.[113] There is a backlog of license applications for water use and no system currently in place to verify existing lawful water uses.[114] A verification programme is being developed to ascertain the details of existing lawful uses, but this process is both slow and resource-intensive.[115] In addition, the enforcement of licences and their conditions is poor.[116] This much is conceded by the state itself in the latest Strategy.[117] Consequently, although existing lawful uses are not subject to the same controls as licences, even if they were, the state simply does not have the capacity to subject existing lawful uses to the same control as the licensing requirements.

The Strategy aims to improve water conservation and demand management by ensuring that holders of water uses report regularly on water use.[118] In addition, it aims to tighten the control, in particular, over large-scale irrigation schemes by introducing regulations that monitor water usage and requiring regular

[111] See Ch 3 (note 224 above).

[112] S Movik and F de Jong (note 68 above) 71.

[113] Strategy (2013) 25.

[114] Strategy (2013) 25.

[115] Strategy (2013) 70 and 72; R Pejan, D du Toit and H Thompson 'Norms for policy implementation lags in the South African water sector' (2011) *Report to the Water Research Commission* 23.

[116] Strategy (2013) 25.

[117] Strategy (2013) 25.

[118] Strategy (2013) 57.

reporting.[119] However, given how poorly the state already performs in terms of monitoring licences and water uses, it remains to be seen whether this will change anything practically. This is especially so given the prevailing skills-shortage, coupled with the lack of political will and financial resources to pursue these goals.[120] To give effect to considerations of equity and redistribution, a more flexible approach to the award of licences is required, which factors in the capacity constraints present in water management.[121]

As stated above, there is a backlog in licence applications and the verification of registered water users as well as existing lawful uses.[122] The Strategy asserts that the backlog has largely been reduced and it now aims to restructure and simplify the application process.[123] This includes establishing a single licensing process between the Department of Mineral Resources, the Department of Water Affairs and the Department of Environmental Affairs.[124]

In addition to the problems outlined above, in terms of the delay in applying for licences, the use of a permit system has been criticised, as it provides greater opportunities for the abuse of public power.[125] By affording the Minister the discretion to manage water uses, it creates an opportunity for both 'the exercise of undue influence and … corruption' as well as the oppression of minorities.[126] This issue has recently been raised in the context of hydraulic fracturing (more commonly known as fracking)[127] where the state alleges that it will reduce the

[119] P Saxby 'Department plans pro-poor amendments to water law' (2013) *LegalBrief Policy Watch*.

[120] See discussion at Ch 5 (note 241 ff above).

[121] S Movik and F de Jong (note 68 above) 78.

[122] Strategy 70. For the issues experienced in this regard see M I Msibi and P Z Dlamini 'Water allocation reform in South Africa: History, processes and prospects for future implementation' (2011) *Report to the Water Research Commission* 81 – 83.

[123] Strategy (2013) 70.

[124] Strategy (2013) 73.

[125] See A Burger 'Roman water law (part 1)' (2007) *Journal of South African Law* 76 – 77.

[126] A Burger (note 125 above) 76.

[127] Hydraulic fracturing is a mechanism of placing the ground under extreme pressure by pumping a combination of water, sand and chemicals into vertical wells, in order to release trapped shale

threat to the environment by implementing a licensing system for this mining activity.[128] However, concerned parties argue that the licensing system is 'vulnerable to political influence' and has been abused by those with political connections.[129]

The second criticism of the permit system in place in South Africa is that it creates uncertainty,[130] particularly in the context of agriculture where water rights are not permanent under a permit system. Without security of tenure in this respect, farmers will be unlikely to invest their time and money in infrastructure. In addition, it is unlikely that banking institutions would be willing to finance agricultural operations where licences can be easily revoked.[131]

Burger also states that the permit system is unconstitutional, as it infringes the separation of powers doctrine by affording the Minister discretionary powers of authorisation that are not based on an objective legal principle. He explains that this mechanism excludes the legislature and 'seriously curtails the functions of the courts'.[132] Burger's concerns bear merit, particularly in the context of a government that faces highly levels of corruption and maladministration.[133] However, the administrative function of the state, including the award of licences, is an incidence of democracy, and is the only rational mechanism to control water use in a manner that is fair and does not rely on land ownership.[134] Secondly, the regulation of water based on the permit system seeks to achieve the goals of the

gas. See further T Wilber *Under the Surface: Fracking, Fortunes and the Fate of the Marcellus Shale* (2012) 3.

[128] GNR 863 of 23 August 2013: Proposed declaration of the exploration for and production of onshore unconventional oil or gas resources and any activities incidental thereto including but not limited to hydraulic fracturing as a controlled activity. F Parker 'Frackers will need to apply for a water licence, says Molewa' *Mail and Guardian* 3 September 2013.

[129] T Taylor 'Fracking system "open to abuse"' *The Citizen* (2013); T Taylor 'Water use licences are just "word salads"' *The Citizen* (2013); D D Tewari 'A detailed analysis of evolution of water rights in South Africa' (2005) *Water World IWHA* 107.

[130] A Burger (note 125 above) 80 – 82; D D Tewari (note 129 above) 107.

[131] A Burger (note 125 above) 80 – 81.

[132] A Burger (note 125 above) 77.

[133] See discussion above at Ch 5 and Ch 7 generally. D D Tewari (note 129 above) 107.

[134] See, however, A Burger 'Roman water law (part 2)' (2007) *Journal of South African Law* 319 – 320 who argues that the principles of Roman law are to be preferred to the use of a permit system.

protection of water resources and the promotion of equality – which are both constitutionally mandated goals.[135] The use of a permit system is integral to the goals of water reform, including the equitable redistribution of water access.[136]

In addition to the inefficiencies caused by the licensing system, the classification of water sources and the determination of the Reserve is also being hindered by problems of inefficiency. Kidd notes that the determination of the Reserve 'entails administrative decision-making of a highly technical nature and it is proving to be a time-consuming process'.[137] The ecological aspect of the Reserve has not yet been implemented in all management areas.[138] It is clear that the classification of water sources as well as the determination of the Reserve entails decision-making that requires complex scientific data as well as a contingent of staff who are able to analyse and process this data. The skills shortage currently experienced by the Department of Water Affairs will almost certainly be a hindrance to this process.[139]

It is not only the lack of technical skill and shortage of personnel that is contributing to the inefficiency of water management. The users of water hamper water management efforts by wasting, polluting and stealing water resources, thereby reducing the quantity of water available as well as its quality.[140] As a result, efforts to address the issues of inefficiency must necessarily address the wastage, theft and pollution of water.

One of the mechanisms put forward to address the wasteful use of water is to value water properly. The Strategy requires water to be more appropriately priced through the implementation of a new pricing strategy, to 'send the correct

[135] See Ch 2 note 198 above.

[136] M I Msibi and P Z Dlamini (note 122 above) 39.

[137] M Kidd (note 104 above) 77.

[138] Strategy (2013) 29.

[139] See discussion above at Ch 5 (note 305).

[140] See Ch 5 (note 251 above).

economic signal that water is a scarce resource'.[141] In this respect, the National Water Act allows the Minister together with the Minister of Finance to establish a pricing strategy in order to fund water resource management and development, as well as to promote the equitable and efficient allocation of water.[142] Financial incentives and disincentives may be implemented to promote the efficient and beneficial use of water, prevent wastage and minimise the detrimental impacts on a water source.[143] This is consistent with the global trend to value water as an economic good to force consumers to use water more carefully.[144]

However, this must be balanced against the right of access to water, and the necessity to ensure that the poor and most vulnerable in society are not prejudiced.[145] The difficulty of creating a pricing system that does not cause undue hardship to the vulnerable in society was highlighted in the *Mazibuko* decision.[146] The state was able to show that, given the complexities in the provision of water services to different households, it was very difficult to implement a system that differentiated between water users.[147]

Communities themselves play an important role in the protection and preservation of water. The separation of society along racial lines prior to 1994 resulted in environmental racism, where black people were viewed as a threat to the

[141] Strategy (2013) 87. See also M Muller (note 79 above) 77; H Mackay 'Water Policies and Practices' in D Reed and M de Wit (eds) *Towards a Just South Africa: The Political Economy of Natural Resource Wealth* (2003) 65.

[142] S 56(1) and (2).

[143] S 56(6)(b). Strategy (2013) 37. See also G R Backeberg 'Water institutional reforms in South Africa' (2005) 7 *Water Policy* 120; A Paterson 'Incentive-based measures' in A Paterson and L Kotzé (eds) *Environmental Compliance and Enforcement in South Africa* (2009) 298, 309 and 320.

[144] P H Gleick 'A look at Twenty-first century water resource development' (2000) 25 *Water International* 133 – 134.

[145] For a discussion on the various debates as to the pricing of water and whether it further entrenches inequality see M Muller (note 79 above) 67 – 87. P Mukheibir and D Sparks 'Water resource management and climate change in South Africa: Visions, driving factors and sustainable development indicators' (2003) *Report for Phase I of the Sustainable Development and Climate Change* project 3.

[146] *Mazibuko (CC)* para 102.

[147] *Mazibuko (CC)* para 102.

environment.[148] Black people were actively excluded from any form of participation in the management of natural resources, including decision-making and any educational and conservationist programmes that were offered by the Department of Agriculture.[149] The low levels of literacy caused by an impoverished educational system 'presented a major obstacle to the development of an aware, informed public, able and willing to participate in environmental decision making'.[150] The mitigation of pollution requires education of the public as to the value of water as low levels of public awareness and education contribute to water wastage and pollution.[151] To remedy this information gap, the Department has implemented a literacy and public awareness programme as part of the 2020 Vision for Water and Sanitation Education Programme, which has already been implemented in a number of schools.[152] The aim is to educate users of water as to its value, in order change the behaviour of these users from wasteful usage patterns to conservationist and protectionist patterns.

3.4. The Management Approaches Practically Required

Chapter 6 introduced the concepts of Integrated Water Resource Management ('IWRM') as well as Adaptive Management. The lack of skills and technical inability that pervade the water sector presents a severe barrier to the successful implementation of Adaptive Management.[153] Further, the failure of the state to establish catchment management agencies and facilitate sincere cooperative governance hinders the proper realisation of IWRM.[154] However, the Department has adopted a long-term approach to water management and has further recognised the importance of flexible decision-making. In addition, it has renewed the focus to improve the technical and skills capacity in the sector and has

[148] See Ch 2 (note 181 above). D A McDonald *Environmental Justice in South Africa* (2002) 17 – 19.

[149] D A McDonald (note 148 above) 19.

[150] D A McDonald (note 148 above) 21.

[151] Strategy (2013) 97.

[152] Strategy (2013) 97.

[153] See discussion above at Ch 5 (note 305).

[154] See Ch 3 (note 277 above).

reiterated the importance of information-gathering processes and systems.[155] While there are many factors that currently undermine the successful implementation of IWRM and Adaptive Management, the long-term benefits of investing in these management approaches are worthwhile.[156] This is especially so, given the likelihood that water resources will in the future need to be even more very closely monitored and managed to ensure that there is sufficient water available to meet the demands.

Both IWRM and Adaptive Management require an ongoing assessment of current data. In this respect, the management of water may be improved by using sustainability indicators.[157] Two situations where these indicators have been practically implemented are discussed below, namely the NeWater Project and the Water Poverty Index. However, these indicators are not, and should not, only be limited to the issues of sustainability. As will be shown below, they may be of great assistance to providing decision-makers with information that has been digested and is therefore more accessible.

Sustainability is a difficult concept to measure, given the vagueness of the criteria of which this definition is comprised, and the consequent difficulty in measuring the success or failure thereof.[158] Similarly, the equity principles are difficult to implement in practice because of the difficulty in establishing measurable standards.[159] Further, there is the difficulty of quantifying the needs of future generations,[160] or balancing the needs of the present generation, particularly where vast inequity exists in access to water resources between different water users.[161]

[155] S 2(h) of the Water Act read with Strategy (2013) 1.

[156] M Wade 'Development of a system dynamics model for the implementation of IWRM in South Africe: Phase I – deriving performance indicators for IWRM implementation on a catchment scale' (2011) *Report to the Water Research Commission* 9

[157] See Ch 5 (note 25 above).

[158] See Ch 5 (note 25 above).

[159] G F Maggio 'Inter/intra-generational equity: current applications under international law for promoting the sustainable development of natural resources' (1996 – 1997) 4 *Buffalo Environmental Law Journal* 171.

[160] G F Maggio (note 159 above) 171.

[161] See, for example, the discussion in *City of Johannesburg and others v Mazibuko and others (Centre on Housing and Evictions as amicus curiae)* [2009] 3 All SA 202 (SCA) para 4 ff.

For example, should the same amount of natural capital available today be available for future generations?[162] This is a clear impossibility in the context of the use of non-renewable resources. However, this depletion may be justifiable in certain contexts where social or human capital is justifiably increased.[163] In South Africa in particular, it may be justifiable to deplete resources to improve and promote socio-economic circumstances to meet the goals of substantive equality.

In the context of sustainability, indicators have been promoted as an objective way of measuring the state's progress.[164] Similarly, this approach may provide a helpful tool to establishing whether the goals of equity are being achieved by the state.

The NeWater project implemented in the Orange River Basin used sustainability indicators to create a Water Vulnerability Index for the region.[165] This index measures all the variable data to ascertain the quality and quantity of water. The project was implemented at a municipal level, thus providing decision-makers with the relevant data to inform their decision-making on a continuous basis. In addition, the index serves the purpose of highlighting vulnerable areas so that decision-makers can monitor and update their policies and plans to cater appropriately for the needs of affected water users and the environment.[166] The indicators should serve to provide decision-makers with information about the socio-economic conditions in a region, the condition and status of water resources, the status of levels of waste and pollution, as well as the performance of governance institutions in terms of their management of water in the region.[167]

[162] G F Maggio (note 159 above) 171; P Dasgupta 'Nature's role in sustaining economic development' *Phil. Trans. R. Soc. B* (2010) 6.

[163] G F Maggio (note 159 above) 171.

[164] See, for example, J J Walmsley, M Carden, C Revenga et al 'Indicators of sustainable development for catchment management in South Africa – Review of indicators from around the world' (2001) 27 *Water SA* 539 – 547; R D Walmsley, J J Walmsley and C Walmsley 'Testing and development of catchment sustainability indicators' (2004) *Report to the Water Research Commission* 3.

[165] J Mysiak et al (eds) *The Adaptive Water Resource Management Handbook* (2010) 176.

[166] J Mysiak (note 165 above) 177.

[167] R D Walmsley, J J Walmsley and C Walmsley (note 164 above) 6, 12 – 18.

Flexibility is important to achieving sustainability as it allows decision-makers to monitor and adapt systems as the context changes.[168] Decision-makers therefore require the tools to ensure that their decisions are appropriately flexible that they advance the goals of sustainability.[169] In this respect, decisions must be capable of being updated and amended as more current information becomes available.[170] The information obtained in the NeWater project as described above can be of great assistance to the process of flexibility by providing decision-makers with adequate data and parameters for continuous decision-making processes.[171]

This flexibility is relevant to the framework for the consideration of data, as it must be amenable to change in order to accommodate different social, environmental and economic values and practices.[172] This is not only applicable between different geographic areas but also different departments. For example, the needs and criteria for the Western Cape, which experiences its predominant rainfall in winter, will be vastly different to the Northern Cape, which experiences its chief rainfall in summer. Departmentally, the criteria to be considered for the supply of water, where the focus is on balancing demand, quality and environmental concerns, will be vastly different to the criteria for the management of wastewater, where the focus is on sanitation processes. As a result, one set of criteria will not be sufficient to furnish the needs of all users and stakeholders across the board.

Sustainability indicators provide a useful theoretical tool to provide decision-makers with both the discretion and the parameters within which to operate, where competing considerations are in play.[173] However, sustainability can only be valuable to society when the decision-makers utilising it have the requisite

[168] J Mysiak (note 165 above) 180.

[169] See discussion above at Ch 6 (note 19).

[170] See discussion above at Ch 6 (note 4719).

[171] J Mysiak (note 165 above) 176.

[172] T D Fletcher and A Deletic (eds) *Data Requirements for Integrated Urban Water Management* (2008) 12; R D Walmsley, J J Walmsley and C Walmsley (note 164 above) 20.

[173] Walmsley et al provide criteria for the selection of indicators, which includes a focus on 'policy relevance and utility for users', 'analytical soundness' and 'measurability of the data'. See in this regard R D Walmsley, J J Walmsley and C Walmsley (note 164 above) 4 – 5.

skills and information adequately to balance these considerations. Furthermore, this decision-making process requires good governance as discretionary decision-making is highly susceptible to corruption and maladministration.[174]

Sullivan et al have developed a Water Poverty Index (the factors of assessment set out in the table below) that assesses the provision of services to local communities in the context of poverty eradication.[175] In terms of this index, poverty is assessed in the context of water management, and the considerations taken into account include the available access to water, the quality of the water, the time taken to access this water, whether sufficient water is provided for domestic and agricultural or industrial uses, and whether the capacity for the management of water exists at a local level.[176]

This Water Poverty Index ('WPI') may provide key information to decision-makers when formulating policies that address issues of access to water and the eradication of poverty. This index can also provide decision-makers with a tool to establish which communities require the greatest assistance thereby prioritising uses. This could, for example, assist the state in justifying that a decision has been taken in the beneficial interest of the public. In addition, this index can assist decision-makers to monitor their own progress, and will create a measurable tool against which the duties of trusteeship can be measured. [177]

[174] See, generally, Ch 5 and 7 above.

[175] C A Sullivan, J R Meigh, A M Giacomello (note 77 above) 89.

[176] C A Sullivan, J R Meigh, A M Giacomello (note 77 above) 190 – 191.

[177] C A Sullivan, J R Meigh, A M Giacomello (note 77 above) 196.

WPI Component	Subcomponents or variables used
Resources (R)	• Assessment of surface water and groundwater availability using hydrological and hydrogeological techniques. • Quantitative and qualitative evaluation of the variability or reliability of resources. • Quantitative and qualitative assessment of water quality.
Access (A)	• Access to clean water as a percentage of households having a piped water supply. • Reports of conflict over water use. • Access to sanitation as a percentage of population. • % of water carried by women. • Time spent in water collection, including waiting. • Access to irrigation coverage adjusted by climate characteristics.
Capacity (C)	• Wealth proxied by ownership of durable items. • Under-five mortality rate. • Educational level. • Membership of water users associations. • % households reporting illness due to water supplies. • % of households receiving a pension/remittance or wage.
Use (U)	• Domestic water consumption rate. • Agricultural water use, expressed as the proportion of irrigated land to total cultivated land. • Livestock water use, based on livestock holdings and standard water needs. • Industrial water use (purposes other than domestic and agricultural).
Environment[a] (E)	• People's use of natural resources. • Reports of crop loss during last 5 years. • % households reporting erosion on their land.

Figure 6: Water Poverty Index[178]

While these indicators are largely focused on poverty in the context of water, it is clear that access to water and poverty are closely associated, both of which are primary factors in the decision-making process in water management in South Africa.[179] Accordingly, any factors that measure the relationship between water use and poverty will provide important information to decision-makers with

[178] C A Sullivan, J R Meigh, A M Giacomello (note 77 above) 194.

[179] See Ch 3 (note 30 above).

regard to access to water and the equity of water use. The table shows that access is one of the express components that is used to measure poverty. The developers of the WPI stated that[180]

> WPI is a powerful tool for determining priorities. It empowers decision-makers to act impartially by allowing them to justify their choices, based on a rational and transparent framework. At the same time, it gives local communities an opportunity to express their needs in a systematic way, and helps them to lobby for action.

As a result, the WPI will not only provide decision-makers with information that is easier to use, but will also provide the community with a mechanism to communicate with decision-makers. This will be equally applicable to other sets of indicators, which can be developed to suit the required goals of water management.

3.5. Available Oversight Mechanisms and Remedies

One of the biggest challenges facing the implementation of effective management of water is a lack of poor enforcement of the regulatory measures. An example of this is contained in the nature of the licensing process. Decision-makers are able to create restrictions for water use upon the award of a water use license.[181] Unfortunately, it is not mandatory for the authority to do so, and it is possible that a water license will be unconditionally awarded. In addition, the monitoring and enforcement of these licensing conditions has thus far not been hugely successful given the capacity constraints in water management.[182] Consequently, even if licenses were to stipulate conditions for their award, this would not necessarily act as a deterrent for offenders, as the state has not adequately enforced these conditions in the past. As stated by Kotzé, 'without compliance and enforcement, the entire environmental governance exercise [is] undermined'.[183]

[180] C A Sullivan, J R Meigh, A M Giacomello (note 77 above) 196.

[181] See Ch 3 (note 240 above).

[182] See note 103 above.

[183] L J Kotzé (note 85 above) 109; R Pejan, D du Toit and H Thompson 'Norms for policy implementation lags in the South African water sector' (2011) *Report to the Water Research Commission* 24.

The Department is competent to deal with the enforcement and compliance of provisions relating to water pollution. While the Department may appoint persons to ensure compliance with the legal framework, the powers of such persons do not adequately allow them to complete this task. Craigie et al argue that the powers and competencies that have been established for this purpose 'do not provide officials with the necessary investigation, search, seizure and arrest powers to render its criminal offence provisions useful'.[184]

The need for designated officials who monitor compliance with the environmental legal framework, particularly the conditions as set out in permits, was recognised by the government and an Environmental Management Inspectorate (hereinafter the 'Inspectorate') was introduced in 2003, through the enactment of National Environmental Management Amendment Act (First Amendment Act).[185] The introduction of the Inspectorate has gone a long way to improving the enforcement, monitoring and compliance of environmental measures.[186] It has done so by creating specialised roles within the Inspectorate that also further cooperation between the various governmental departments to rationalise the approach to enforcement mechanisms.[187] Further, it has established training programmes for the skills development of Inspectors and established minimum required skills for their employment.[188] The functions of these Inspectors are graded according to their skills set, but these can be as wide-ranging as including powers to enter and search any premises without a permit, formally question a person and/or inspect a premises, take possession of any item, and obtain any

[184] F Craigie, P Snijman and M Fourie (note 87 above) 83.

[185] 46 of 2003. S 31 of the NEMA. F Craigie, P Snijman and M Fourie (note 87 above) 89.

[186] Craigie et al note that there are problems encountered with the implementation of the Inspectorate programme. For example, they have been unable to retain staff, which is compounded by the fact that they are not likely to ever have sufficient capacity to deal with all environmental crime in South Africa, largely due to human and financial constraints. See F Craigie, P Snijman and M Fourie (note 87 above) 95 – 96.

[187] F Craigie, P Snijman and M Fourie (note 87 above) 90 – 91.

[188] GN R494 of 2 June 2006: Regulations for the qualification criteria, training and identification of, and forms to be used by, environmental management inspectors.

evidence necessary in circumstances where a reasonable suspicion of an environmental offence has occurred.[189]

Given the potential of this institution to ensure compliance with environmental goals, as well as the speed and success with which it has been initially established, it is surprising that water and mining pollution have been excluded from the purview of the Inspectorate.[190] It has been suggested that an independent, central environmental enforcement agency 'outside the normal spheres of government' is one method of regulating compliance.[191] In terms of establishing an entity that is independent and able to monitor the compliance with the legal framework of water management, this idea has many advantages. This agency, should it be established, should however be given the powers to monitor and ensure compliance with the legal framework governing both water and mineral law.

Other mechanisms to hold the state accountable are already in practice. For example, the NEMA expressly requires the Department of Water Affairs, amongst others, to submit an environmental implementation and management plan at least every four years to the Minister or MEC for Environmental Affairs and Tourism, for evaluation.[192] The underlying purpose of these plans is to promote cooperative governance and ensure consistency between the various departments in the context of environmental management.[193] Once these plans have been submitted, they must be published in the Government Gazette, and from that point onwards they are binding on that department.[194] Further, any official, even if they have delegated powers, must act 'substantially in accordance' with these plans and 'substantial deviations' are to be reported to the Director-General of the Department.[195]

[189] S 31 NEMA.

[190] F Craigie, P Snijman and M Fourie (note 87 above) 96 at fn 204.

[191] F Craigie, P Snijman and M Fourie (note 87 above) 101 – 102.

[192] S 11(1) and (2) of the NEMA; (note 104 above) 41.

[193] S 12 of the NEMA; M Kidd (note 104 above) 41.

[194] S 15(5) NEMA.

[195] S 16.

However, Kidd notes that while these provisions are theoretically sound, their practical implementation thus far has been abysmal.[196] Departments have failed to submit and publish plans timeously, sometimes with a delay of years.[197] Further, Kidd also points out that the Department of Minerals and Energy is not amongst the list of departments required to submit these plans.[198] Given the environmental damage caused by mining activities, particularly in the context of water, this omission represents a severe flaw in the legislation and undermines the goals of cooperative governance.

Where the state has failed to fulfil its obligations and civil society wishes to hold it accountable, they can do so by approaching the court to seek judicial review of the decision. However, judicial review is inherently problematic. For one, it is limited to a focus on the legality of a decision, rather than whether the decision was made correctly based on the merits.[199] The second problem is that judicial review is inaccessible to most due to the high cost of litigation.[200] Finally, judicial review is 'circuitous', as it is unclear whether 'administrators actually learn from the case law'.[201] As a result, judgments may be handed down with the intention of remedying defective administrative behaviours, but administrators remain largely ignorant thereof. In addition, there is the issue of the counter-majoritarian dilemma and the extent to which judicial interference in the activities of the legislature and executive can be justified.[202] However, the Constitutional Court has emphasised that a modern constitutional democracy requires an interrelated and integrated approach to be adopted between the judiciary, executive and

[196] M Kidd (note 104 above) 41.

[197] M Kidd (note 104 above) 41.

[198] M Kidd (note 104 above) 41.

[199] C Hoexter (note 55 above) 59, 159 – 162; D du Toit, S Pollard and R Pejan 'A rights approach to environmental flows: What does it offer?' (2009) *The Association for Water and Rural Development* 7.

[200] C Hoexter (note 55 above) 59, 161 – 162; S Liebenberg (note 55 above) 46 – 47, 479; R Summers 'Common-law remedies for environmental protection' in A Paterson and L Kotzé (eds) *Environmental Compliance and Enforcement in South Africa* (2009) 368; A Gowlland-Gualtieri 'South Africa's water law and policy framework: Implications for the right to water' (2007) 3 *International Environmental Law Research Centre* 2 - 3.

[201] C Hoexter (note 55 above) 61.

[202] S Liebenberg (note 55 above) 63.

legislature.[203] A flexible relationship between these three institutions must be adopted, with the ultimate goal of ensuring that socio-economic rights, and more broadly the tenets of the Constitution, are implemented and furthered.[204]

Alternative remedies can be pursued in terms of the common law, for example, obtaining a prohibitory or mandatory interdict.[205] However, inherently problematic in this respect is the fact that these common law remedies have been developed and established 'principally to protect individual rights to property'.[206]As a result, these remedies are not well-suited to providing a solution to environmental issues centred on the public interest.[207] While the common law must be developed consistently with the mandates established by the Constitution, Summers states that these remedies 'should not...be viewed as an alternative to the statutory regulation of the environment, but rather as an important complement'.[208]

The Water Tribunal is also able to hear appeals based on the merits of the matter, and is in theory intended to be more suitably qualified to make a decision within the context of the highly specialised, complex field of water law.[209] However, the Water Tribunal to date has been largely 'dysfunctional'.[210] In 2012, the Water Tribunal was dissolved by the Department of Water and Environmental Affairs on the basis that it was not properly constituted.[211] It has also been suggested that the previous Water Tribunal lacked the necessary legal expertise to properly implement the Act.[212] This situation is to persist until legislative amendments

[203] S Liebenberg (note 55 above) 68 – 69.

[204] S Liebenberg (note 55 above) 68 - 69.

[205] See Ch 7 (note 314 above).

[206] R Summers (note 200 above) 368.

[207] R Summers (note 200 above) 369.

[208] R Summers (note 200 above) 369.

[209] C Hoexter (note 55 above) 64.

[210] Taylor 'Fracking system "open to abuse"' *The Citizen* 4 September 2013.

[211] L Ensor 'Acting water tribunal to be appointed' (2013) *Business Day.* S Blaine 'Water Tribunal suspended after losing chairman' *Business Day* 13 September 2012.

[212] W Ncube 'Resurrecting the water tribunal' *Mail and Guardian* 6 May 2013.

have been put in place to increase the efficiency of the Tribunal. An interim Tribunal is to be constituted to address the backlog of queries.[213]

However, the future of the Water Tribunal is no longer certain. The failings of the Tribunal have been recognised by the state in the National Water Policy Review, which states:[214]

> An appropriate, administratively simpler mechanism is required where disputes are resolved through internal dispute resolution such as round-tables, negotiation and mediation. Failure to resolve an appeal through this mechanism may proceed to adjudication in a court of law.

Implementing mechanisms that facilitate easier, quicker and cheaper access to justice are critical to the goals of water management, particularly ensuring equitable access to water. Alternative dispute resolution mechanisms also represent a shift towards customary law approaches to the extent that the remedies employed traditionally involve less adversarial approaches that focus on ensuring fairness and equity.[215]

Research suggests that the control and authority that customary communities experienced in relation to water 'since the pre-colonial era has been eroded'.[216] Water in rural areas is still to a large extent managed as a common pool resource in terms of customary law, although this practice is being overshadowed by the introduction of catchment management agencies.[217] As stated by Sowman and Hasler, the implementation of the new approach to water management may 'marginalize and replace these customary systems which contribute to [water resource management] objectives'.[218] As a result, they argue for a more clearly defined role for traditional leaders and greater involvement of local communities. This will not only facilitate a more meaningful role for these communities, but

[213] L Ensor 'Acting water tribunal to be appointed' (2013) *Business Day.*

[214] Para 21.

[215] See discussion at Ch 7 (note 4 above).

[216] M Sowman and R Hasler 'Institutional dimensions of water resource management in South Africa: Socio-cultural perspectives' (2009) *Water Research Commission* iv.

[217] M Sowman and R Hasler (note 216 above) v.

[218] M Sowman and R Hasler (note 216 above) v.

also assist with ensuring their buy-in into the process of water protection and access.[219] They also argue for the recognition of the cultural practices and norms in place so that indigenous knowledge of the area can be retained and incorporated into water management models.[220]

4. Concluding Remarks

The purpose of this chapter was to provide an analysis of the approach to water management. It is clear that the classifications of *res publicae* and *res communes* have not only been confused by the courts,[221] but also confuse the issue of trusteeship. To the extent that they do not shed any light on an interpretation of trusteeship, they are unhelpful in defining the parameters of the state's responsibilities. Similarly, the inherent difficulties with the public trust doctrine[222] mean that it is unable to deepen the understanding of trusteeship, except possibly in limited and specific scenarios. Further, many of these difficulties are not experienced in South Africa as the legal framework adequately addresses these issues.[223]

It is suggested that the Constitutional Court, in particular, needs to assume a more active role in ensuring that the state complies with its duties, particularly when contrasted with their approach to the environment.[224] The current legal framework adequately caters for the management of water and it is largely the practical implementation of the duties of trusteeship to which effect is not properly given.[225] However, some of the functions of various state authorities are not clearly defined or are duplicated.[226] In addition, the separate approach to the

[219] See above at Ch (note 73) and Strategy (2013) 58.

[220] M Sowman and R Hasler (note 216 above) iv – ix; B H Richardson and D Craig 'Indigenous peoples, law and the environment' in B J Richardson and S Wood (eds) *Environmental Law for Sustainability* (2006) 195.

[221] See note 7 above.

[222] See note 24 above.

[223] See note 24 above.

[224] See note 61 above.

[225] See note 67 above.

[226] See note 85 above.

management of water and sanitation services in municipal areas, and the use of water within catchment management areas, is to be consolidated in order that the entire water value chain will be coherently managed.[227] The failure of the state to adequately set up catchment management agencies was also repeated as well as the suggested shortcomings of the nature of these agencies.[228]

The values that arise from the legal framework also contain shortcomings, although these are experienced at a practical level. In particular, inefficiency on the part of the state results in most of the grievances pertaining to water management.[229] This inefficiency is largely caused by a lack of funding, leadership and accountability, as well as a shortage of staff and technical skills.[230] These shortcomings are neither easy to overcome, nor is there a quick, one-size-fits-all solution.[231] However, the state has clearly acknowledged that it is aware of these problems and aims to address them.[232] Further, the long-term approach that has been adopted in respect of water management also evidences an appreciation on the part of the state that the nature of the problems experienced require long-term solutions.[233]

It has been argued that central to any decision-making concerning the environment is flexibility.[234] In this respect, South Africa has implemented IWRM at the level of catchment management agencies, and Adaptive Management in the context of addressing climate change.[235] It is argued that Adaptive Management of water resources should be extended to the management of all water resources in all circumstances. However, sufficient information, which is both processed and up-to-date is required for decision-makers to properly implement these

[227] See note 68 above.

[228] See note 72 above.

[229] See note 99 above.

[230] See note 99 above.

[231] See note 57 above.

[232] See note 57 above.

[233] See Ch 6 note 100 above.

[234] See note 168 above.

[235] See note 157 above.

approaches.[236] This requires technical skills and financial and institutional resources, all of which are already in short supply.[237] Indicators may be of assistance in implementing these approaches, by providing digested information that is of greater use to decision-makers.[238] Further, these approaches require a concerted effort between the various Departments to actively implement the principles of cooperative governance.[239] This further requires trust and communication between the Departments, both of which appear to be lacking between the Department of Water Affairs and the Department of Minerals and Energy in particular.[240] Similarly to sustainability, the implementation of the principles relating to equity in practice may be facilitated through the implementation of indicators, such as the Water Poverty Index.[241] The implementation of these indicators can assist the state with its decision-making processes and can also provide a tangible standard against which the state's satisfaction of its duties as trustee can be measured.[242]

Finally, the inadequacies of the oversight, compliance and enforcement mechanisms as well as the remedies available to aggrieved parties must be addressed. In particular it is argued that the Department of Water Affairs urgently needs dedicated Inspectors who have the requisite powers to ensure compliance with licensing and statutory requirements.[243] Alternatively, the current Inspectorate established in terms of the NEMA must have the scope of its mandate widened to include oversight of water resources.[244] The concerns with judicial review have been canvassed and it is clear that this method does not facilitate adequate accountability of the state.[245] The costs as well as the lengthy

[236] See Ch 6 note 62 above.

[237] See note 153 above.

[238] See note 157 above.

[239] See note 154 above.

[240] See note 7 above.

[241] See note 175 above.

[242] See note 177 above.

[243] See note 185 above.

[244] See note 190 above.

[245] See note 210 above.

duration of litigation prevent access to justice for those who do not have the time, resources or know-how to launch proceedings against the state.[246] Consequently, a functional Water Tribunal must urgently be established and alternative dispute resolution mechanisms aimed at cheap and efficient remedies should be created.[247]

[246] See note 200 above.

[247] See note 210 above.

Chapter Nine:

CONCLUSION

1. Public Trusteeship and Water Management

The importance of water as a resource cannot be denied, particularly in South Africa, where, for decades, millions of people were denied access to sufficient water. In 2008, Professor Asmal wrote:[1]

> Water has been called the oil of the 21st century, with all the political and economic pressures accompanying that. Failure to ensure its judicious use will put paid to aspirations for the kind of economic growth required to provide our citizens with the basic rights they're entitled to under our Constitution. No fresh water, no economic growth, no social justice.

This thesis aimed to address the following topic, namely, 'Public trusteeship and water management: Developing the South African concept of public trusteeship to improve management of water resources in the context of South African water law'. To do so, a number of questions were asked, with the intention of attempting to shed light on the nebulous notion of state trusteeship. The notion of state trusteeship and custodianship is not unique to the area of water law.[2] Due to the constraints of this thesis, its operation in other areas of resources law has not been considered and there are a number of issues that can be canvassed in future research in this respect.[3]

2. Returning to the Research Question

The first question that this thesis addressed was *why has trusteeship been implemented?* As outlined, the scarcity of water, combined with the rapidly

[1] WWF 'WWF pays tribute to Kader Asmal' 23 June 2011

[2] See Ch 8 (note 2 above).

[3] See, for example, E van der Schyff 'Stewardship doctrines of public trust: Has the eagle of public trust landed on South African soil? (2013) 130 *South African Law Journal* 370; E van der Schyff 'The concept of public trusteeship as embedded in the National Water Act, 1998' (2011) *Water Research Commission* 91 - 92.

increasing demand therefor, will ultimately result in the untenable situation where insufficient water will be available to sustain the requirements of society.[4] Without state intervention, if water use continues at its current rate, this will be the most likely outcome.[5] This will occur irrespective of the additional pressures on available water resources, including pollution, climate change, and a myriad of other stresses caused by human interference that effect the quantity and quality of available water.[6] It is, therefore, necessary for the state to regulate the use of water resources.

The historical background against which modern water management emerged was mired in the racial inequality to access resources.[7] Consequently, the Constitution sought drastically to amend the legal framework governing water resources to address the concerns of the gross social inequalities of access to water, whilst simultaneously ensuring the protection of water resources.[8] This resulted in the introduction of the National Water Act and the Water Services Act, which abolished the distinctions between public and private ownership of water.[9] Instead, all water in the hydrological cycle is public water, and its use is administered by the state as the trustee of this resource.[10] The answer to the first question is therefore as follows: the denial of access to resources in the past has resulted in huge inequalities of access to water and water services in the present - the modern appreciation of water as a finite and precious resource against this background necessitates state management of the resource in the interests of the South African public.[11] As a result, trusteeship aims to place the state in a different role to that of its oppressive predecessors. Instead, the state is required to serve the people, by ensuring that the beneficial interest of the public is furthered

[4] See Ch 1 (note 22 above).

[5] See Ch 5 (note 255 above).

[6] See Ch 1 (note 45 above).

[7] See Ch 3 (note 1 above).

[8] See Ch 2 (note 198 above).

[9] See Ch 2 (note 208 above).

[10] See Ch 2 (note 222 above).

[11] See Ch 2 (note 255 above).

in the context of the constitutional goals of ensuring access to water and the protection of the environment.[12] These constitutional goals require the promotion of the principles of equity and sustainability, as well as efficiency.[13] The state's role is still administrative in nature. However, the principles and values that guide the administration and management of water resources has changed.

The second question asked was *who is required to give effect to trusteeship and who are the intended beneficiaries of the system of trusteeship?* The National Water Act clearly provides that the National Government is the trustee of water resources.[14] The Minister of the Department of Water Affairs is authorized to act on behalf of the National Government. The Water Services Act places the responsibility on the National Government as custodian.[15] To dilute the concentration of power from central government, the powers and functioning of the system of water management is intended to be delineated to the lowest appropriate levels, both in the context of catchment management areas and water service providers.[16] In this respect, the Minister may delegate or assign these duties to catchment management agencies, water user associations, water service authorities, and water service providers.[17] The delegation and assignment of duties is problematic for two reasons: the first is that it is slowing down the development and implementation of catchment management agencies;[18] the second is that it is unclear whether the assignment of duties results in a severing of the duties of trusteeship from the Minister.[19] However, it is argued that the stated purposes of the Act go beyond the duties required in terms of the trusteeship provision and consequently, even if this were to be the case, duties similar to trusteeship would

[12] See Ch 2 (note 208 above).

[13] See Ch 2 (note 256 above).

[14] See Ch 3 (note 183 above).

[15] See Ch 3 (note 341 above).

[16] See Ch 3 (note 268 above).

[17] See Ch 3 (note 192 above).

[18] See Ch 3 (note 199 above).

[19] See Ch 3 (note 200 above).

still need to be satisfied by an authority or provider performing assigned duties.[20] The legislative framework makes it clear that the intended beneficiaries of the system of trusteeship are the public. In addition, in terms of the Constitutional provisions,[21] the definition of 'public' is not limited to South African citizens only.

Thirdly, this thesis asked *what are the legal parameters of trusteeship?* The trusteeship of water resources is not expressly defined by the legislative framework. The research question thus sought to address the nature and content of the duties of state trusteeship by looking to the legal framework.[22] The starting point for ascertaining these duties was to discuss the legal framework introduced by the Constitution, the legislative and regulatory enactments pursuant to the Constitution, and the consequent strategies and policies.[23] The National Water Act sets out that the responsibilities of the state entail administrative functions, namely, the protection, use, development, conservation, management and control of water resources.[24] The state is required to administer water rights through the use of a licensing system, the goals of which are to further equity amongst water users, whilst protecting the resource and the environment more generally.[25] In addition, the legislative framework aims to achieve a decentralised model of water management, by devolving the powers of water management to catchment management agencies.[26]

The fourth question sought to ask *whether the content of trusteeship could be informed by historical sources or comparative law*. In *Mostert Snr and another v S*,[27] the Supreme Court of Appeal clearly stated that water, running in a river or

[20] See Ch 3 (note 208 above).

[21] See Ch 3 (note 36 above).

[22] See Ch 5 generally.

[23] See Ch 3 generally.

[24] See Ch 3 (note 184 above).

[25] See Ch 3 (note 221 above).

[26] See Ch 3 (note 266 above).

[27] [2010] 2 All SA 482 (SCA).

stream, is to be classified as *res communes.*[28] This is in contradiction to the traditional Roman and Roman-Dutch law classifications, in terms of which this type of property would have been classified as *res publicae.*[29] This latter classification better explains the administrative nature of the state's role in relation to managing water resources.[30] This notwithstanding, the Supreme Court of Appeal's ruling that water is to be classified as *res communes* may better reflect the modern appreciation of water as a shared, global resource.[31] The only practical implementation of this classification - one which is particularly disturbing, given the scale of theft of water in South Africa - is to make water as a resource incapable of theft.[32]

The public trust doctrine does not necessarily facilitate a more meaningful understanding of trusteeship, either.[33] While the primary requirements are similar, that is, the state is required to manage the resource in the public benefit, the statutory framework in South Africa is far clearer and requires much more of the state than the doctrine in the U.S.[34] Neither a historical perspective, nor a comparative investigation has furthered the understanding of the duties of trusteeship.[35]

The fifth question looked to establishing *what are the substantive principles that inform the operation of the state's duties as trustee?* The National Water Resource Strategy, implemented in accordance with the National Water Act, provides that the goals of water management are the equitable, efficient and sustainable use of water.[36] In this respect, equity refers to the promotion of substantive equity to

[28] See Ch 4 (note 118 above).

[29] See Ch 4 (note 118 above).

[30] See Ch 8 (note 8 above).

[31] See Ch 4 (note 146 above).

[32] See Ch 4 (note 160 above).

[33] See Ch 4 (note 168 above).

[34] See Ch 8 (note 223 above).

[35] See Ch 4 generally.

[36] See Ch 5 (note 2 above).

ensure that the effects of the prejudicial past are redressed.[37] It also requires the promotion of the value of dignity, which it has been argued, is intimately linked to ensuring that all persons are able to access water and water services.[38] Sustainability requires the furthering of the precautionary principle[39] the preventative principle[40] and the polluter-pays principle.[41] The goals of sustainability, and environmental management, are to ensure that the resource is conserved as best as possible, whilst still allowing for the development of the nation, in accordance with social and economic goals.[42] Thus, the protection, conservation and preservation of the environment are to be undertaken in a manner that does not undermine social and economic goals. The converse is also true, as without a functioning environment, human survival would not be possible.[43] Finally, the goals of trusteeship require the efficient use of water.[44] This requires not only an efficient infrastructure in terms of the physical systems in place to transport, store and recycle water,[45] but also the requisite financial, technical and other skills to promote efficiency within the Department of Water Affairs.[46] It is the argument of this thesis that these values, namely equity, sustainability, and efficiency, form the core of trusteeship. The duties established by the legislation must be pursued in fulfillment of these values.

The sixth question asked *how does trusteeship operate in practice, that is, what are the requirements for the management of water?* In this respect, the practical approaches to water management, as required by the legal framework, were discussed.[47] These consist of Integrated Water Resource Management, which

[37] See Ch 5 (note 124 above).

[38] See Ch 5 (note 181 above).

[39] See Ch 5 (note 53 above).

[40] See Ch 5 (note 63 above).

[41] See Ch 5 (note 104 above).

[42] See Ch 5 (note 5 above).

[43] See Ch 5 (note 18 above).

[44] See Ch 5 (note 241 above).

[45] See Ch 5 (note 245 above).

[46] See Ch 5 (note 295 above).

[47] See Ch 6 generally.

seeks to approach the management of water resources in a coordinated way;[48] and Adaptive Management, which entails the ongoing assessment of information to continuously inform and revise the decision-making process.[49] It is by implementing a flexible and coordinated approach to decision-making, which relies on current information, that the values of trusteeship can be satisfied. However, as highlighted, the functioning of these management approaches relies on having the requisite skills and infrastructure in the industry, both of which are in critical demand.[50] It is further dependent on a functioning state, which lives up to the values of accountability and good governance.

The seventh question was concerned with *how is trusteeship enforced?* The democratic rights used to keep government conduct in check are applicable in this context. The rights of access to information and public participation provide valuable platforms for ensuring that the state complies with its duties.[51] The Chapter 9 institutions created by the Constitution find application in the context of ensuring that the state complies with its various functions.[52] The Water Tribunal should, in theory, also provide an effective mechanism for holding the state accountable.[53] Where state conduct amounts to administrative action, it will be reviewable in terms of judicial review.[54] However, state conduct that does not fall within the definition of administrative review may still be reviewable on the basis of the principle of legality.[55] Finally, civil and criminal remedies may be pursued where the mechanisms, aimed at ensuring that the state complies with its duties, fail.[56]

[48] See Ch 6 (note 16 above).

[49] See Ch 6 (note 19 above).

[50] See Ch 6 (note 98 above).

[51] See Ch 7 (note 28 above).

[52] See Ch 7 (note 138 above).

[53] See Ch 7 (note 157 above).

[54] See Ch 7 (note 166 above).

[55] See Ch 7 (note 305 above).

[56] See Ch 7 (note 310 above).

The final question asked *what are the shortcomings of the approach to trusteeship and water management?* It is well known that the problems associated with water management exist, not necessarily as a consequence of the legislative framework itself, but rather because of the implementation thereof.[57] In particular, the greatest hurdle to the proper management of water is inefficiency.[58] In this respect, the state has a critical shortage of skills as well as sufficient finances to manage water properly.[59] In addition, the separation of the management of water generally, and the management of water and sanitation services into two separate legal frameworks is problematic.[60] Consistent with the approach of treating all water within the hydrological cycle as one entity, all water within the entire value chain should be coherently managed.[61] The state is aware of these issues and has set itself long-term goals to rectify these problems.[62] One of the issues that has not been addressed, however, is the lack of clarity as to the effect of delegation or assignment of powers, as well as the slow pace at which the delineation of power is being completed.[63] In addition, there are insufficient mechanisms in place to ensure the compliance and enforcement of licensing conditions and statutory obligations. This glaring oversight requires urgent remediation.[64] So, too, does the fact that the Water Tribunal is completely dysfunctional and has had to be disestablished.[65] Where the costs of litigation are so high, in the absence of cheap and efficient mechanisms for dispute resolution, many legitimate complaints will fall by the way side.[66] This is an untenable situation, and certainly not consistent with the values of trusteeship, which require the state to manage water resources

[57] R Pejan and J Cogger 'The application of assignment and delegation within the context of the National Water Act: the implications for Catchment Management Agencies' (2013) 130 *SALJ* 126.

[58] See discussion at Ch 5 (note 241 ff).

[59] See discussion at Ch 5 (note 241 ff).

[60] See Ch 8 (note 69 above).

[61] See Ch 8 (note 69 above).

[62] See Ch 5 (note 70 above).

[63] See Ch 8 (note 83 above).

[64] See Ch 8 (note 82 above).

[65] See Ch 8 (note 210 above).

[66] See Ch 8 (note 200 above).

for the benefit of the public.[67] Inherent in this construction is the capacity of the public to hold the state accountable to this duty. What is needed is 'a more flexible, less resource-intensive system that fits with actual capacity and takes people's local needs into account'.[68]

3. State Accountability

Nowhere is this more apparent than in the Mothutlung region, in the North West province, where water shortages recently resulted in tragedy.[69] The members of a community took to the streets to protest, after what was believed to be incompetence and/or incapacity and/or poor management resulted in their water supply being cut off for over a week.[70] Unfortunately, two men were killed during the violent protests.[71] This story is just one indication of the appalling state of affairs of water management in parts of the country, particularly at a municipal level. Without a serious and determined effort on the part of the state to earnestly change this reality, the rights of dignity and equality of many of the South African public will never be realised.[72] Whether the use of the rhetoric of 'trusteeship' will facilitate this process is irrelevant: it does not matter what the title of the state as administrator is, as long as the state implements its duty to administer water resources in a sustainable, equitable and beneficial manner that furthers its constitutional mandate.[73]

[67] See Ch 3 (note 185 above).

[68] S Movik and F de Jong 'Licence to control: implications of introducing administrative water use rights in South Africa' (2011) 7/2 *Law, Environment and Development Journal* 78.

[69] S Hlongwane 'Two men were killed in Brits – for water' (2014) *Business Day Live*.

[70] S Hlongwane (note 69 above). Members of the community in Carolina were also forced to resort to violoent protest action over a lack of safe, sufficient drinking water. See *Federation for Sustainable Environment and Another v Minister of Water Affairs and Others* (35672/12) [2012] ZAGPPHC 140 (26 July 2012).

[71] S Hlongwane (note 69 above).

[72] See Ch 5 (note 181 above).

[73] See generally Ch 3 and Ch 5 above.

Addendum A

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